(5)

Supreme Court, U.S.
FILED
JAN 8 1996
CLERK

No. 95-386

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1995

JASON RICHARDS and FANNIE HILL,
Petitioners,

vs.

JEFFERSON COUNTY, ALABAMA
and BIRMINGHAM-JEFFERSON CIVIC
CENTER AUTHORITY,
Respondents.

On Writ Of Certiorari To The Supreme Court Of Alabama

JOINT APPENDIX

WILLIAM J. BAXLEY
JOEL E. DILLARD
Baxley, Dillard, Dauphin
& McKnight
2000 Sixteenth Avenue South
Birmingham, Alabama 35205
(205) 939-0995

Attorneys for Petitioners

WILLIAM M. SLAUGHTER
RICHARD H. WALSTON
Haskell Slaughter Young
& Johnston,
Professional Association
1200 AmSouth/Harbert Plaza
1901 Sixth Avenue North
Birmingham, Alabama 35203
(205) 251-1000

Attorneys for Respondents

Petition for Certiorari Filed on September 7, 1995
Certiorari Granted on November 22, 1995

130PP

TABLE OF CONTENTS

Chronological List of Relevant Docket Entries iii

Plaintiffs' Complaint, filed April 21, 1992 1

Defendants' Answer (excluding exhibits), filed May 29, 1992 15

Motion to Intervene of Birmingham-Jefferson Civic Center Authority (excluding exhibits), filed June 4, 1992 22

Defendants' Motion for Summary Judgment (excluding exhibits), filed June 4, 1992 25

Act 406 Enacted at the 1967 Regular Session of the Legislature of Alabama (first appeared in record as Exhibit A to Defendants' Answer) 33

Ordinance No. 1120 Adopted by the Jefferson County Commission (first appeared in record as Exhibit B to Defendants' Answer) 34

Complaint in *Bedingfield v. Jefferson County* (appeared in record as part of Exhibit B to Defendants' Motion for Summary Judgment) 44

Complaint in *Phillips et al. v. Jefferson County* (appeared in record as part of Exhibit B to Defendants' Motion for Summary Judgment) 49

Plaintiffs' memorandum of Law in *Bedingfield v. Jefferson County* (appeared in record as part of Exhibit B to Defendants' Motion for Summary Judgment) 53

Order of Circuit Court Consolidating *Bedingfield v. Jefferson County* and *Phillips et al. v. Jefferson County* (appeared in record as part of Exhibit C to Defendants' Motion for Summary Judgment) 59

TABLE OF CONTENTS (Continued)

Judgment of Circuit Court in *Bedingfield v. Jefferson County* (appeared as part of Exhibit C to Defendants' Motion for Summary Judgment) 60

Opinion of Supreme Court of Alabama in *Bedingfield v. Jefferson County* (first appeared in record as Exhibit A to Defendants' Motion for Summary Judgment) 65

Defendants' Motion to Strike Affidavits Submitted by Plaintiffs, filed November 2, 1992 75

Plaintiffs' Notice of Filing of Documents Relating to a Parallel Pending Federal Action, filed March 2, 1993 82

Defendants' Request for Certification to Appeal Interlocutory Order, filed August 18, 1993 99

Order of Circuit Court With Respect to Defendants' Motion for Summary Judgment, entered November 17, 1993 105

Order of Circuit Court Certifying Questions for Interlocutory Appeal, entered November 17, 1993 106

Opinion of Supreme Court of Alabama, released March 31, 1995 110

Plaintiffs' Application for Rehearing, filed April 14, 1995 124

Order of Supreme Court of Alabama Overruling Plaintiffs' Application for Rehearing, entered June 9, 1995 125

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

April 21, 1992 — Plaintiffs' Complaint filed in the Circuit Court for Jefferson County, Alabama.

May 29, 1992 — Answer filed by Defendants Jefferson County and Randy Godeke.

June 4, 1992 — Motion to Intervene filed by Birmingham-Jefferson Civic Center Authority, together with Answer as Defendant.

June 4, 1992 — Motion for Summary Judgment filed by Defendants Jefferson County and Randy Godeke.

June 19, 1992 — Order of Recusal entered by original Circuit Judge, requesting appointment of a Circuit Judge from outside the Tenth Judicial Circuit (Jefferson County).

April 8, 1993 — Original Order entered by Circuit Judge, John Rochester (specially sitting because of recusal of original judge), denying Defendants' Motion for Summary Judgment as to the Plaintiffs' federal constitutional claims and granting said motion as to the Plaintiffs' state claims.

August 18, 1993 — Defendants filed Motion to Vacate Prior Order because parties did not receive timely notice of Circuit Court's order with respect to summary judgment.

August 18, 1993 — Defendants filed Request for Certification to Appeal Interlocutory Order as basis for appealing the Circuit Court's order denying Defendants'

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES (Continued)

Motion for Summary Judgment as to the Plaintiffs' federal constitutional claims.

November 17, 1993 — Circuit Court vacated original order with respect to Defendants' Motion for Summary Judgment, entered new Order denying said motion as to the Plaintiffs' federal constitutional claims and granting said motion as to Plaintiffs' state claims, and entered Order certifying questions for interlocutory appeal to Supreme Court of Alabama.

January 6, 1994 — Supreme Court of Alabama granted permission for an interlocutory appeal of the questions certified by the Circuit Court.

March 31, 1995 — Supreme Court of Alabama released its opinion and judgment.

April 14, 1995 — Plaintiffs filed Application for Rehearing before Supreme Court of Alabama.

June 9, 1995 — Application for Rehearing denied by Supreme Court of Alabama.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

JASON RICHARDS and FANNIE HILL, individually and on behalf of all employees, excluding employees of the United States of America, who are subject to the Jefferson County, Alabama occupational tax which is more particularly described by this complaint; and GEORGE DAVID DYKES and JOAN FOLEY DYKES, individually and on behalf of all employees of the United States who are subject to the Jefferson County, Alabama occupational tax which is more particularly described by this complaint;

Plaintiffs,

vs.

JEFFERSON COUNTY, a political subdivision of the State of Alabama, and RANDY GODEKE, individually and in his official capacity as Director of the Department of Revenue for Jefferson County, Alabama, and as successor in office to C. H. Ritchie, former Director of the Department of Revenue for Jefferson County, Alabama

Defendants.[1]

COMPLAINT
Filed April 21, 1992

Plaintiffs, by and through their undersigned counsel, complain and allege as follows:

[1] All pleadings and orders contained in this Joint Appendix were originally filed in this case, except those items preceded by the caption for a different case.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to Rule 57, Alabama Rules of Civil Procedure and 42 U.S.C. 1983, as this is a civil action arising under the laws and Constitution of the United States. This action involves a violation of federal law for which 42 U.S.C. 1983 provides a remedy, and to which Rule 57 of the Alabama Rules of Civil Procedure is applicable. A question of intergovernmental immunity arising under the Buck Act, 4 U.S.C. 101, et seq, is presented by Plaintiffs Dykes individually, and on behalf of all similarly situated federal employees. Venue lies in the Circuit Court for Jefferson County, Alabama, the tax challenged by this action being levied and collected by Jefferson County, Alabama, against and from plaintiffs, and similarly situated class members within Jefferson County, Alabama.

PARTIES

2. Plaintiff Jason Richards is a courier privately employed by a law firm in Jefferson County, Alabama, and is a resident citizen of Jefferson County, Alabama; Fannie Hill is a domestic servant privately employed in commercial buildings in Jefferson County, Alabama, and is a resident citizen of Jefferson County, Alabama; they bring this action individually on their own behalf, and in a representative capacity on behalf of all other employees in Jefferson County, Alabama, other than employees of the United States of America, who have been subject to the levy, collection and payment of taxes established by Jefferson County Ordinance 1120, commonly known as the Jefferson County Occupational Privilege Tax ("the occupational tax") since January 1, 1988. George David Dykes is a Reclamation Specialist employed by the United States of America in the Office of Surface Mining, Department of the Interior in Jefferson County, Alabama, and is a

resident citizen of Jefferson County, Alabama; Joan Foley Dykes is a Registered Nurse employed by the United States of America in the Department of Veterans' Affairs in Jefferson County, Alabama, and is a resident citizen of Jefferson County, Alabama; they bring this action individually on their own behalf, and in a representative capacity on behalf of all other employees of the United States of America, who have been subject to the levy, collection and payment of the occupational tax since January 1, 1988. Plaintiffs Jason Richards, Fannie Hill, and Joan Foley Dykes have been required by their employers to pay the occupational tax at all times relevant to these proceedings, continuously since January 1, 1988, when the occupational tax became effective. Plaintiff George David Dykes was required by his employer to pay the occupational tax for approximately one year after enactment of the occupational tax, after which he refused to continue to do so, based upon the authorities cited herein.

CLASS ACTION AVERMENTS

3. This lawsuit is brought by plaintiffs as a class action, on their own behalf and on behalf of all others similarly situated, under the provisions of Rule 23(a) and Rule 23(b)(1) of the Alabama Rules of Civil Procedure for injunctive and declaratory relief, and for an order awarding members of the plaintiff classes compensatory damages in sums equal to the amounts of taxes illegally levied, collected and paid by them, and for relief incident and subordinate thereto, including costs and attorneys fees pursuant to 42 U.S.C. 1988, and such other authorities as shall be determined applicable to this action.

4. The classes represented by plaintiffs in this action, and of which plaintiffs themselves are members, consist of all persons subject to the occupational tax, both federal and non-federal employees, who have been subject

to its levy, collection and payment since January 1, 1988, when the occupational tax became effective.

5. The exact number of members of the classes, as herein identified, is not known, but it is estimated that there are thousands of members of each class. The classes are so numerous that joinder of individual members herein is impracticable.

6. There are common questions of law and fact in the action that relate to and affect the rights of each member of the classes represented by the named plaintiffs and the relief sought is common to both classes, namely a declaration that the occupational tax is unconstitutional.

7. The claims of plaintiffs, who are representatives of the class herein are typical of the claims of the classes they represent, in that the claims of all members of the classes, including plaintiffs, depend on a showing of the unconstitutionality of the occupational tax in a manner which is beneficial to each. There is no conflict as between any individual named plaintiff and any other member of either class with respect to this action, or with respect to the relief sought herein. The Dykes Class of federal employees are beneficiaries of federal and state statutes which prohibit discrimination in a manner which is consistent with the general prohibition of discrimination applicable to the Richards/Hill Class of non-federal employees, and both classes are protected equally by the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, and the state laws cited herein.

8. The named plaintiffs are the representative parties for their respective classes, and are able to, and will, fairly and adequately protect the interests of the classes they represent. The attorneys for plaintiffs are experienced and capable in litigation in the field of constitutional, tax and civil rights claims, and have successfully represented claimants in other litigation of this nature.

ALLEGATIONS OF FACT

9. On or about January 1, 1988, Defendant Jefferson County levied and began collecting, and Plaintiffs and the classes they represent began involuntarily paying, the occupational tax, which was described by Defendant as a "license or privilege tax on natural persons engaged in any vocation, occupation, calling or profession who are not required by law to pay any license or privilege tax to the state or county." A copy of the occupational tax ordinance is attached to this complaint, and made a part hereof as Exhibit A.

10. The occupational tax is calculated as one-half of one percent of the gross earnings of plaintiffs and members of both classes, but is characterized by Defendant as a license or privilege tax, rather than an income tax. Specifically the taxing ordinance provides:

> It shall be unlawful for any person to engage in or follow any vocation occupation, calling or profession as defined in Section 1 within the County on and after the 1st day of January, 1988, without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent (1/2%) of the gross receipts of each such person.

11. The taxing ordinance also defines gross receipts and compensation, as follows:

> The words "gross receipts" and "compensation" shall have the same meaning, and both words shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other considerations having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for

> any work done or personal services rendered in any vocation, occupation, calling or profession, including any kind of deductions before "take home" pay is received; but the words "gross receipts" and compensation shall not mean or include amounts paid to traveling salesmen or other workers as allowance or reimbursement for traveling or other expenses incurred in the business of the employer, except to the extent of the excess of such amounts over such expenses actually incurred and accounted for the by employee to the employer.

12. The occupational tax carves out of its scope, by way of its definition of "vocation, occupation, calling and profession" a substantial array of persons, as follows:

> The words "vocation, occupation, calling and profession" shall mean the doing of any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within Jefferson County, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any non-resident of Jefferson County who is employed by any employer as defined in this section, where the relationship between the individual performing the services and the person for whom such services are rendered is, as to those, services, the legal relationship of employer and employee, including also a partner of a firm or an officer of a firm or corporation, if such partner or officer receives a salary for his personal services rendered in the business of such firm or corporation, but they shall not mean or include domestic servants employed in private homes and shall not include businesses, professions or occupations for which license fees are required to be paid under any General License Code of the County or to the State of Alabama or the

> County by any of the following: Chapter 12, Article 2, Title 40; Sections 40-21-50, 40-21-52, 53, 54 and 55; 40-21-57, 58, 59 and 60; 40-16-6; and 27-4-9 of the Code of Ala. 1975, as amended.

and also includes within its ambit all federal employees represented here by Plaintiffs Dykes, as follows:

> The words "vocation, occupation, calling and profession" shall also mean and include the holding of any kind of office or position either by election or appointment, by any federal, state, county or city officer or employee where the services of such official or employee are rendered within Jefferson County, Alabama.

13. The occupational tax broadly defines "employer" to "mean and include any person, business, firm, corporation, partnership, association or any other kind of organization who or that employs any person in any vocation, occupation, calling or profession in Jefferson County, Alabama, within the meaning of subsection (B) of Section 1 of this Ordinance." (This subsection is set forth in full at paragraph 12 of this complaint). Defendant, by and through its Director of Revenue and County Attorney, has interpreted "employer" to include the United States of America, and "employee" to include all federal employees in Jefferson County, including all United States District Judges in the Northern District.

14. The occupational tax by its terms, and in actual practice, exempts from its levy, collection and payment businesses and vocations or occupations listed at Chapter 12, Article 2, Title 40, Code of Ala. 1975, as amended, which range from attorneys, certified public accountants, dentists and physicians to blueprint makers, casket manufacturers, pig iron storage operators, lightning rod installers and snuff retailers, and it includes a specific exemption for domestic servants employed in private homes. By its terms and in actual practice, it taxes all

federal employees, including all United States District Judges in the Northern District of Alabama, all Circuit, District and Probate Judges in Jefferson County, and an array of other occupations, including couriers, secretaries, skilled and unskilled laborers, police officers, business executives, teachers and domestic servants not employed in private homes.

15. The net effect, dollarwise, of the occupational tax, is an absurdity which allows, by way of example, physicians and attorneys earning hundreds of thousands of dollars a year to pay a license fee of $150.00 or less and avoid the occupational tax — which would be levied at more than ten times the amount of the license fee paid by these high income professionals. In all cases, the occupational tax imposes upon those citizens against whom it is levied and collected a percentage of income tax which is substantially more than the license fees paid by similarly situated persons exempted from its burden.

16. The occupational tax, on its face and in actual practice, is arbitrary and capricious, and discriminatory in a manner which defies logic and, insofar as federal employees are concerned, 4 U.S.C. 111. The array of persons subject to the occupational tax, when compared with the array of persons exempted from the tax, and the concomitant disparity in taxes paid by and between occupations in Jefferson County, Alabama which fall within and without the burden of the occupational tax, render it irrational, unduly burdensome, and violative of the equal protection clause and the due process clause of Fourteenth Amendment to the Constitution of the United States.

17. The content, nature and characteristics of the employment of Plaintiffs Dykes, Richards and Hill, and all the members of the classes they represent, are neither reasonably, rationally or fairly different, nor professionally distinct, from the content, nature and characteristics

of the employment of the above described persons exempt from the occupational tax, and the economic burden thrust upon them by Defendant, relative to those exempted, is substantial and absurd.

18. The irrationality and unconstitutionality of the occupational tax is well known to the Defendant's officers and agents responsible for its administration and collection, and has resulted in their adoption of a policy of further exempting from its levy and collection federal employees who refuse to pay it. This pay-if-you-wish policy is itself arbitrary and capricious, irrational, indicative of Defendant's callous disregard of the constitutional rights of other federal and private employees from whom the tax is collected, and demonstrative of Defendant's cognizance of the constitutional defects complained of herein.

19. Plaintiffs aver that unless Defendant is enjoined and restrained by the court from enforcing the occupational tax ordinance, they will suffer economic injury.

COUNT ONE

DYKES CLASS BUCK ACT CLAIMS AND FEDERAL CONSTITUTIONAL CLAIMS

20. Plaintiffs Dykes, individually and on behalf of the above described class of employees of the United States which they represent, claim Defendants, a political subdivision of the State of Alabama and its Director of Revenue, acting by and through their County Attorney, and such other administrative officers as have acted and continue to act in concert with them, were and are acting under color of a statute, ordinance, regulation, custom or usage of the State of Alabama in subjecting its citizens described herein to a deprivation of rights, privileges or immunities secured by the Constitution and laws of the United States, specifically 4 U.S.C. 111 and the due pro-

cess and equal protection clauses of the Constitution of the United States.

21. The occupational tax violates the equal protection guaranties of the Fourteenth Amendment to the United States Constitution and 4 U.S.C. 111 by unreasonably and arbitrarily favoring the above described state, local and private employees who are exempted from its purview in the unequal manner described above while taxing the similarly situated federal employees represented by Plaintiffs Dykes as described herein.

22. The occupational tax has been previously challenged in this court on non-federal and other state law grounds, and, its measurement by a percentage of pay or compensation for personal service as described by 4 U.S.C. 111 notwithstanding, been declared to be a license or privilege tax rather than an income tax. *Bedingfield* v. *Jefferson County,* 527 So.2d 1270 (Ala. 1988). In the trial court in *Bedingfield, supra,* the plaintiff initially asserted that the occupational tax was, under state law, an illegal income tax; the trial court rejected that claim, and it was abandoned on appeal.

23. Plaintiffs Dykes and their similarly situated federal employee class members also claim the occupational tax is so arbitrary and irrational, as described herein, as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, both on its face and in its application to both classes of taxpayers bringing this action.

COUNT TWO

RICHARDS/HILL CLASS FEDERAL CLAIMS

24. Plaintiffs Richards and Hill, individually and on behalf of the class of non-federal employees they represent, claim Defendants, a political subdivision of the State of Alabama, and its Revenue Commissioner, acting

in concert with their County Attorney, and such other administrative officers as have acted and continue to act in concert with them, were and are acting under color of a statute, ordinance, regulation, custom or usage of the State of Alabama in subjecting or causing its citizens described herein to a deprivation of rights, privileges or immunities secured by the Constitution and laws of the United States, specifically the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

25. The occupational tax violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States by discriminating against Plaintiffs Richards and Hill, and the class of similarly situated non-federal employees they represent, a class against whom it has been and is now levied and collected, in a manner which is not only arbitrary and irrational, as described herein, but which also creates an unjust, unreasonable and improper classification of citizens subject to the tax. There is no legitimate difference between Plaintiffs Richards and Hill, and the class of non-federal employees they represent and the above described exempted employees which is related to any legitimate government object or purpose, and the arbitrariness and capriciousness of selection of the Richards/Hill class by Defendant to pay the occupational tax is clear upon the face of the taxing ordinance and in its implementation by Defendant. Persons engaged in the same businesses as Richards and Hill, and the members of the class they represent are granted exemption privileges by Defendant under employment conditions which are the same as those experienced by Richards, Hill and the Richards/Hill class, while the Richards/Hill class is contemporaneously, arbitrarily and unreasonably — in the context of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States — taxed.

26. The occupational tax has been previously challenged in the state courts on other state law grounds, and, its measurement by a percentage of pay or compensation for personal service notwithstanding, been declared to be a license or privilege tax rather than an income tax. *Bedingfield* v. *Jefferson County*, 527 So.2d 1270 (Ala. 1988). In the trial court in *Bedingfield*, *supra*, the plaintiff initially asserted that the occupational tax was, under state law, an illegal income tax; the trial court rejected that claim, and it was abandoned on appeal. Additionally, these federal constitutional claims are joined in this action with federal Buck Act claims which present a related federal statutory question under federal law.

27. Plaintiffs Richards and Hill and their similarly situated non-federal employee class members also claim the occupational tax is so arbitrary and irrational, as described herein, as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, both on its face and in its application to both classes of taxpayers bringing this action.

COUNT THREE

DYKES CLASS PENDENT STATE LAW CLAIMS

28. Plaintiff Dykes, individually and on behalf of the above described class of employees of the United States which they represent, claim the occupational tax violates Code of Ala. 1975, Section 40-18-3, which provides that the salaries, fees, commissions or other income of officers or agents of the United States or its agencies and instrumentalities or its contractees, received from the United States or from its agencies and instrumentalities, shall be subject to income taxes levied by the state of Alabama as other income is taxed, but without discrimination, and only to the same extent and in the same

manner as other income is taxed, insofar as the State of Alabama may be constitutionally or legally authorized to tax such income.

29. The Alabama Constitution prohibits cities and counties from collecting income taxes, hence Defendant's designation of the occupational tax as a license or privilege tax, despite its measurement by a percentage of gross income or gross receipts.

30. The occupational tax, as a license tax measured by a percentage of gross income or gross receipts, authorized by a general law of the State of Alabama, is nevertheless subject to the "without discrimination" prohibition of Code of Ala. 1975, Section 40-18-3, and that code section's requirement that it be collected "only to the same extent and in the same manner as other income is taxed." Plaintiffs Dykes and the class of federal employees they represent, based upon the above described allegations regarding persons exempted from paying the occupational tax, aver that they have been discriminated against and required to pay taxes to a different extent and in a different manner from their incomes in violation of Code of Ala. 40-18-3 and the due process and equal protection provisions of the Constitution of Alabama of 1901.

COUNT FOUR

RICHARDS/HILL CLASS PENDENT STATE CLAIMS

31. Plaintiffs Richards and Hill, individually and on behalf of the class of non-federal employees subject to the occupational tax which they represent, aver that the occupational tax discriminates against non-federal employees, as described above, in a manner which violates the due process and equal protection provisions of the Constitution of Alabama of 1901.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court grant and award them the following relief:

A. That a hearing be set as soon as practicable after commencement of this action, under Rule 23(c)(1), Federal Rules of Civil Procedure, to determine by order whether this action is to be maintained as a class action, and whether certification should be conditional, and whether the Richards' and Dykes' classes should be certified as sub-classes pursuant to Rule 23(c)(4)(B), Alabama Rules of Civil Procedure.

B. That the Court declare the occupational tax unconstitutional, as depriving plaintiffs of due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, violative of intergovernmental immunity secured by 4 U.S.C. 111, violative of the due process and equal protection clauses of the Constitution of Alabama of 1901, and violative of Code of Ala. 1975, Section 40-18-3.

C. That the Court declare the occupational tax unconstitutional in its application to plaintiffs, depriving them of due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, violative of intergovernmental immunity secured by 4 U.S.C. 111, violative of the due process and equal protection clauses of the Constitution of Alabama of 1901, and violative of Code of Ala. 1975, Section 40-18-3 by virtue of Defendants' policy of allowing taxpayers who disagree with the tax to disregard it while insisting upon its payment by those who cannot persuade their employers to cease payroll deductions or who otherwise lack the necessary clout with Defendants to prevent its levy and collection.

D. That the Court award plaintiffs, as compensatory damages suffered as a result of Defendant's deprivations

of the constitutional rights described herein, a sum equal to the amount of tax each has paid to the Defendant since January 1, 1988.

E. That the Court enjoin and restrain Defendant from continued deprivations of the constitutional rights described herein by way of the occupational tax.

F. That the Court allow plaintiffs and their counsel all costs in this proceeding and payment of a reasonable attorneys fee, determined by 42 U.S.C. 1988 and/or pursuant to equitable common fund principles to attorneys for plaintiffs and the classes represented by them.

G. That the Court award plaintiffs such other and further relief as the Court, after a full hearing, deems appropriate.

[Subscription of Attorney Omitted in Printing]

* * * * * * *

ANSWER

Filed May 29, 1992

[Caption Omitted in Printing]

Come now the Defendants, Jefferson County, Alabama, a political subdivision of the State of Alabama, and Randy Godeke, individually, and in his official capacity as Director of the Jefferson County, Alabama, Department of Revenue, and for answer to the Complaint state as follows:

FIRST DEFENSE

Admission and Denial

1. For answer to paragraph 1 of the Complaint, Defendants admit that Plaintiffs attempt to invoke the jurisdiction of this Court pursuant to 42 U.S.C. § 1983, 4 U.S.C. § 101 and Rule 57, Alabama Rules of Civil Procedure. Defendants admit that Jefferson County, Alabama, is the proper venue for this case.

2. For answer to paragraph 2 of the Complaint, Defendants demand strict proof in that Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations regarding residence and employment of Jason Richards, Fannie Hill, George David Dykes and Joan Foley Dykes. Defendants state that they are without sufficient information to form a belief as to the truth of the remaining allegations of paragraph 2 of the Complaint and demand strict proof.

3. For answer to paragraph 3 of the Complaint, Defendants admit that Plaintiffs attempt to invoke the provisions of Rule 23, Alabama Rules of Civil Procedure.

4. For answer to paragraph 4 of the Complaint, Defendants admit that Plaintiffs are subject to the Jefferson County occupational tax.

5. For answer to paragraph 5 of the Complaint, Defendants admit that there are numerous taxpayers.

6. For answer to paragraph 6 of the Complaint, Defendants deny that the Jefferson County occupational tax is unconstitutional.

7. For answer to paragraph 7 of the Complaint, Defendants deny that the occupational tax is unconstitutional. Defendants state that they are without information and belief as to any conflicts which may or may not exist between Plaintiffs and demand strict proof.

8. For answer to paragraph 8 of the Complaint, Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and demand strict proof.

9. For answer to paragraph 9 of the Complaint, Defendants admit that on or about January 1, 1988, Jefferson County, Alabama, began to levy and collect the occupational tax. Defendants deny that Plaintiffs paid said tax involuntarily. For answer to the remaining portion of paragraph 9 of the Complaint, Defendants plead the language of the occupational tax ordinance which is attached hereto as Exhibit "A" and Act No. 406, Legislature 1967, attached as Exhibit "B".

10. For answer to paragraph 10 of the Complaint, Defendants plead the plain language of the Jefferson County occupational tax which is attached hereto as Exhibit "A" and which speaks for itself.

11. For answer to paragraph 11 of the Complaint, Defendants plead the plain language of the Jefferson County occupational tax which is attached hereto as Exhibit "A" and which speaks for itself.

12. For answer to paragraph 12 of the Complaint, Defendants plead the plain language of the Jefferson County occupational tax which is attached hereto as Exhibit "A" and which speaks for itself.

13. Admitted.

14. For answer to paragraph 14 and 15, Defendant states as follows:

The Jefferson County Occupational Tax Ordinance No. 1120 comports with the express authority granted to the Jefferson County Commission by Act No. 406, Legislature of Alabama, 1967 ("Act No. 406"). Act No. 406 reflects an acknowledgment of the Alabama Legislature that numerous persons, corporations, firms, associations or entities were already required by State law to pay a license or privilege tax to either the State of Alabama or to the County pursuant to Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429 and 826 in Title 51 of the Code of Alabama of 1940, as amended. Act No. 406 authorized the County Commission to levy a license or privilege tax upon any person, corporation, firm, association or other entity and business, vocation, occupation, calling or profession that is not required by law to pay any license or privilege tax to either the State of Alabama or the County by any of the foregoing provisions of the Code of Alabama.

The legislature in Section 6, Act No. 406, further limited the authority granted to the County Commission by declaring that:

> Section 6. No license or privilege tax levied by the governing body of the county on any person for engaging in any business shall be at a rate which is in excess of the rate of license or privilege tax levied by the largest municipality of the county on the same or similar type of business activity.

Accordingly, the Jefferson County Occupational Tax ordinance incorporates the same exclusions from its provisions as are required by Act No. 406. Further, the Jefferson County Occupational Tax Ordinance specifically excludes "domestic servants employed in private homes" for the reason that such persons are excluded from the occupational tax of the City of Birmingham which is the largest municipality located in Jefferson County, as required by Section 6, Act No. 406, above.

15. Defendants deny paragraphs 16 and 17. For further answer thereto, Defendants assert that federal employees engaged in a business, vocation, occupation, calling or profession are treated exactly the same as all other persons without regard to the nature of their employer. That is, only those federal employees that are not required by law to pay any license or privilege tax to either the State of Alabama or the County by any of the foregoing quoted provisions are subject to the occupational tax.

The purpose of Act No. 406 was to authorize the County to impose a license or privilege tax upon persons who are engaging in such businesses, vocations, occupations, callings and professions without paying any license tax through either the State or County.

Additionally, the rate of the Jefferson County Occupational Tax is exactly the same for all persons subject

thereto. Said rate is .05 percent of the gross receipts of such persons earned in Jefferson County. There is no difference in rate between persons employed by the federal government and all other persons who are subject to the tax.

16. Defendants deny paragraph 18. For further answer Defendants assert that Defendants have instituted a reasonable and orderly procedure to effect collection of the occupational tax. Substantial start up work and effort has been required to develop the required information so as to identify those persons subject to the tax and to initiate tax withholding procedures by employers in the County. Substantial efforts were required to achieve such withholding action by the federal employers in Jefferson County. No exceptions from the tax beyond those required by Act No. 406 have been established or allowed. A program to collect arrearages from persons who have failed or refused to pay the tax as required by law is ongoing.

17. Defendants deny paragraph 19.

18. For answer to paragraph 20 of the Complaint, Defendants deny that they have deprived Plaintiffs of any right, privilege or immunity secured by the Constitution or laws of the United State of America.

19. Denied.

20. For answer to paragraph 22 of the Complaint, Defendants admit that the occupational tax at issue in this case has been previously challenged in the state courts on both federal and state constitutional claims. Defendants aver that the occupational tax at issue in this case has already been held constitutional by the Alabama Supreme Court in the case *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988). Further, that the Plaintiffs in *Bedingfield* had the opportunity to appeal the *Bedingfield* decision of the Alabama Supreme Court to the Supreme Court of the United States, which opportunity said Plain-

tiffs failed to pursue and thereby waived and forfeited and which decision of the Alabama Supreme Court is now a matter adjudged and conclusive upon and res judicata to all of the rights of Plaintiffs asserted herein. Defendants deny the remaining allegations of paragraph 22 of the Complaint.

21. Denied.

22. For answer to paragraph 24 of the Complaint, Defendants deny that they have deprived Plaintiffs of any right, privilege or immunity secured by the Constitution or laws of the United States of America.

23. Denied.

24. For answer to paragraph 26 of the Complaint, Defendants admit that the occupational tax at issue in this case has been previously challenged in the state courts on both federal and state constitutional claims. The Alabama Supreme Court has held that the occupational tax at issue in this case is constitutional. *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988). Defendants deny the remaining allegations of paragraph 26 of the Complaint.

25. Denied.

26. Denied.

27. Denied.

28. Denied.

29. Denied.

30. Defendants deny each and every remaining allegation of the Complaint and demand strict proof thereof.

SECOND DEFENSE

Res Judicata

Defendants plead the affirmative defense of res judicata as a complete or partial bar to the causes of action set forth in the Complaint.

THIRD DEFENSE

Collateral Estoppel

Defendants plead the affirmative defense of collateral estoppel to the causes of action set forth in the Complaint.

FOURTH DEFENSE

Non Claim Statute

Defendants plead the Alabama non claim statute as a complete or partial bar to the relief requested in the Complaint.

FIFTH DEFENSE

Laches

Defendants plead the defense of laches as a complete or partial bar to the causes of action set forth in the Complaint.

SIXTH DEFENSE

Statute of Limitations

Defendants plead the applicable statute of limitations as a complete or partial bar to the relief sought in the Complaint.

SEVENTH DEFENSE

No Deprivation of Federally Protected Right

Defendants aver that Plaintiffs have not been deprived of any right, privilege or immunity secured by the Constitution or laws of the United States of America.

EIGHTH DEFENSE

Voluntary Payment

Defendants aver that all payments made by named Plaintiffs have been voluntary.

NINTH DEFENSE

No Buck Act Violation

Defendants plead the provisions of 4 U.S.C. § 106 as a defense to Plaintiffs' Buck Act claims.

TENTH DEFENSE

Immunity

Defendant, Godeke, pleads the defense of immunity whether absolute, qualified, good faith or discretionary function.

ELEVENTH DEFENSE

Waiver

Defendants plead the affirmative defense of waiver as a complete or partial bar to the causes of action set forth in the Complaint.

TWELFTH DEFENSE

General Defenses

1. Defendants assert that the Complaint fails to state a cause of action upon which relief can be granted.

2. Defendants plead good faith in all their dealings with Plaintiffs.

3. Defendants plead the general issue.

[Subscription of Attorney and Certificate of Service Omitted in Printing]

****

MOTION BY BIRMINGHAM-JEFFERSON CIVIC CENTER AUTHORITY FOR AN ORDER TO INTERVENE

Filed June 4, 1992

[Caption Omitted in Printing]

Comes now the Intervenor/Defendant, Birmingham-Jefferson Civic Center Authority ("BJCC"), by and through the undersigned attorneys, and moves this court for leave to intervene pursuant to Rule 24(a)(2), Alabama Rules of Civil Procedure, or in the alternative, pursuant to Rule 24(b)(2), Alabama Rules of Civil Procedure, and as grounds in support thereof, states as follows:

1. That on or about April 21, 1992, the Plaintiffs, Jason Richards, Fannie Hill, George David Dykes and Joan Foley Dykes (the "Plaintiffs"), filed with this court the above referenced matter.

2. That the Plaintiffs' complaint seeks to have Ordinance No. 1120 which was adopted by the Jefferson County Commission pursuant to Act No. 406, enacted at the 1967 regular session of the Alabama Legislature, as amended, (the "Occupational Tax") declared unconstitutional as depriving the Plaintiffs of due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, violative of intergovernmental immunities secured by 4 U.S.C. § 111, violative of the due process and equal protection clauses of the Constitution of Alabama of 1901, and violative of *Ala. Code* § 40-18-3 (1975).

3. That Plaintiffs' complaint seeks an injunction restraining the Defendants from alleged constitutional deprivations of the Plaintiffs' constitutional rights described in said complaint by way of the Occupational Tax.

4. That on January 15, 1989, the BJCC issued Capital Outlay Special Tax Bonds, Series 1989 in the principle amount of $83,710,000.00 for the purpose of providing funds to expand and improve portions of the BJCC complex. *See* Birmingham-Jefferson Civic Center Authority Capital Outlay Special Tax Bonds, Series 1989 a true and correct copy of which is attached hereto as Exhibit "A" and incorporated herein.

5. That on August 15, 1989, the BJCC issued Capital Outlay Special Tax Bonds, Series 1989B in the principle amount of $48,670,000.00 for the purpose of providing funds to be used to expand and improve portions of the BJCC complex. *See* Birmingham-Jefferson Civic Center Authority Capital Outlay Special Tax Bonds, Series 1989B

a true and correct copy of which is attached hereto as Exhibit "B" and incorporated herein.

6. That pursuant to that certain Pledge and Appropriation Agreement between the Defendant, Jefferson County and the Intervenor, said Defendant appropriated, pledged and agreed to pay a portion of the proceeds of the Occupational Tax issue in this matter to the BJCC for repayment of the Series 1989 and Series 1989B Capital Outlay Special Tax Bonds issued by the BJCC in twenty (20) annual payments of $10,000,000.00 beginning in the year 1989 and ending in the year 2008. *See* attached hereto as Exhibit "C" a true and correct copy of said Pledge and Appropriation Agreement between the Defendant, Jefferson County and the BJCC.

7. That the Plaintiffs' complaint seeks to ultimately have declared as unconstitutional and/or unlawful the Occupational Tax which is the primary source of revenue pledged specifically to satisfy the BJCC's Series 1989 and 1989B Capital Outlay Special Tax Bonds, and further seeks to have Defendant repay to Plaintiffs all payments made pursuant to said tax.

8. That of the total $132,470,000.00 received by the BJCC from the issuance of the Series 1989 and Series 1989B, Capital Outlay Special Tax Bonds, approximately $125,000,000.00 has either already been spent or contractually obligated to be paid by the BJCC.

9. That the BJCC's Series 1989 and 1989B Capital Outlay Special Tax Bonds which were issued by the BJCC and purchased by the bondholders in reliance upon the County's obligation to levy and collect the Occupational Tax constitute an "interest" which is the subject of the action presented by the Plaintiffs' complaint.

10. That an order declaring the Occupational Tax unconstitutional and/or unlawful, as a practical matter, will impair and/or impede the BJCC's ability to protect its interest and the interest of the bondholders.

11. That attached hereto as Exhibit "D" and incorporated herein by reference is the BJCC's proposed Answer to the Plaintiffs' Complaint.

12. That defenses asserted in Exhibit "D" presents both questions of law and fact common with Plaintiffs' Complaint.

13. That this motion to intervene is, and has been, presented to this Court timely.

14. That the legal interest of the BJCC will not be adequately protected by the Defendant.

WHEREFORE, PREMISES CONSIDERED, the Intervenor/Defendant, the Birmingham-Jefferson Civic Center Authority, respectfully moves this Court for an order allowing it to intervene into this civil action.

[Subscription of Attorney and Certificate of Service Omitted in Printing]

* * * * * * *

MOTION FOR SUMMARY JUDGMENT

Filed June 4, 1992

[Caption Omitted in Printing]

COME NOW the Defendants, Jefferson County, Alabama, a political subdivision of the State of Alabama, and Randy Godeke, individually and in his official capacity as Director of Revenue of Jefferson County, Alabama and hereby *Move For Summary Judgment* in their favor in accordance with Rule 56, Alabama Rules of Civil Procedure as follows.

The Jefferson County Occupational Tax has already been challenged and upheld on both state and federal constitutional grounds. In *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988) the Alabama Supreme Court held that Act 406 and Jefferson County Ordinance 1120 imposing the occupational tax were constitutional. This suit is clearly barred by the doctrine of res judicata. The

material facts are undisputed. Defendants are entitled to a judgment as a matter of law.

This motion is supported by the *Bedingfield* opinion attached as Exhibit A; excerpts of the *Bedingfield* complaints collectively attached hereto as Exhibit B; the trial court's final order in the Bedingfield case attached hereto as Exhibit C; excerpts of Bedingfield's appellate briefs collectively attached hereto as Exhibit D; Amicus Briefs on behalf of the AFL-CIO, Birmingham Area Chamber of Commerce, Public Employees Local Union 1317, and Shelby County, Alabama collectively attached hereto as Exhibit E; Alabama Act No. 406, Legislature 1967 attached as Exhibit F [hereafter referred to as "Act No. 406"]; and, Jefferson County Occupational Tax Ordinance No. 1120 attached as Exhibit G [hereafter referred to as "Ordinance No. 1120"].

FACTS

1. On September 28, 1987 the Jefferson County Commission adopted Ordinance 1120 levying a county-wide occupational tax effective January 1, 1988.

2. THE PRIOR SUIT. In October, 1987 the City of Birmingham, Alabama and Hoyt Bedingfield, individually and in his official capacity as Finance Director for the City of Birmingham, filed suit in the Tenth Judicial Circuit against Jefferson County, Alabama and the Jefferson County Commission and alleged that Act No. 406 and Ordinance No. 1120 were violative of the state and federal constitutions and were, therefore, void. The Verified Complaint [attached at Exhibit B] stated a cause of action under the Alabama Declaratory Judgment Act § 6-6-220, Alabama Code; Sections 44, 45, 71, 104, 105, 212, Alabama Constitution; and the equal protection and due process clauses of the United States and Alabama Constitutions. This suit was denominated Case No. CV 87-504-465.

3. In October, 1987 Carolyn Phillips, John Rogers and Dale Patton, all individuals, filed suit against the Jefferson County Commission in the Tenth Judicial Circuit and also alleged that Act No. 406 and Ordinance No. 1120 were unconstitutional and void. That case was denominated Case No. CV 87 504-469. That Complaint alleged that the Act and Ordinance violated Sections 105, 106, 110, Alabama Constitutional and the due process clause, equal protection clause and Fourteenth Amendment to the United States Constitution. [Complaint attached as Exhibit B].

4. In November, 1987 Phillips, Rogers and Patton amended their complaint to expand their federal equal protection and due process claims and to add federal civil rights claims pursuant to 42 USC § 1983 and 1988. [Amended Complaint also attached at Exhibit B].

5. The cases were consolidated by order of the trial court dated November 18, 1987. [Order also attached as Exhibit B].

6. The consolidated cases were tried on December 2, 1987 and final judgment in favor of the County was entered on December 11, 1987. [Final Order attached as Exhibit C].

7. The consolidated cases were appealed to the Alabama Supreme Court. In their brief, Appellants argued that Act No. 406 and Ordinance No. 1120 violated the federal and state constitutions. [Excerpts of Bedingfield brief attached as Exhibit D].

8. The Alabama Supreme Court permitted amicus briefs from the Birmingham Area Chamber of Commerce, the Alabama AFL-CIO, the Laborers International Union of North America, Local 1317, and Shelby County, Alabama. All of the amicus briefs asserted federal equal protection and state constitutional challenges against the occupational tax. [Amicus Briefs attached as Exhibit E].

9. On May 20, 1988 the Alabama Supreme Court released its opinion wherein it affirmed the trial court and held that Act No. 406 and Ordinance No. 1120 were constitutional. [Bedingfield opinion attached hereto as Exhibit A].

INTRODUCTION

This is a tax case. Plaintiffs assert causes of action under the Alabama Declaratory Judgment Act; the equal protection clause of the United States Constitution; 42 USC § 1983; and the Buck Act — 4 USC § 101 et seq.

As set forth below, this action is barred by the Doctrine of Res Judicata. The occupational tax at issue has already been challenged on both federal and state constitutional grounds and has been upheld by the Alabama Supreme Court. The material facts are undisputed. Accordingly, the County is due the entry of summary judgment in its favor.

ARGUMENT

The elements of the affirmative defense of res judicata are: (1) a prior judgment on the merits; (2) rendered by a court of competent jurisdiction; (3) substantial identity of the parties; and (4) substantially same cause of action. *Baker v. City of Guntersville,* 1992 WL 69934 (Ala. Civ. App. April 10, 1992), adopting, *NAACP v. Hunt,* 891 F.2d 1555 (11th Cir. 1990); *Dairyland Insurance Co. v. Jackson,* 566 So.2d 723 (Ala. 1990). These elements are discussed as follows.

1. PRIOR JUDGMENT

Clearly, the *Bedingfield* trial court and Supreme Court rendered prior judgments on the merits.

2. COURT OF COMPETENT JURISDICTION

Clearly, the trial court and Alabama Supreme Court had jurisdiction over the *Bedingfield* case.

3. SUBSTANTIAL IDENTITY OF PARTIES

In *Dairyland, supra,* the Supreme Court held that:

> [T]he party identity criterion of res judicata does not require complete identity, but only that the party against whom res judicata is asserted was either a party *or* in privity with a party to the prior action *or* that the non-party's interests were adequately represented by a party in the prior suit, and the relationship between the party and non-party is not so attenuated as to violate due process.

566 So.2d at 725, 726, citing, *Whisman v. Alabama Power Co.,* 512 So.2d 78, 82 (Ala. 1987).

In *NAACP v. Hunt, supra,* the Eleventh Circuit applied Alabama res judicata law to bar a second suit challenging the display of the Confederate battle flag on the Alabama capitol. The Court defined privity as "a relationship between one who is sufficiently close so as a judgment for or against the party should bind or protect the nonparty." 891 F.2d at 1560. The court further held:

> privity exists where the nonparty's interests were represented adequately by the party in the original suit. Privity also exists where a party to the original suit is so closely aligned to a nonparty's interest as to be his virtual representative.

891 F.2d at 1560, citing, *United Merchants v. Sanders,* 508 So.2d 689, 692 (Ala. 1987).

The "interests" of Hoyt Bedingfield, Carolyn Phillips, John Rogers, Dale Patton, the City of Birmingham, the Birmingham Area Chamber of Commerce, the AFL-CIO, the Public Employees Local 1317 and the citizens of Shelby County, Alabama are *identical* to the interests of the named plaintiffs in the instant suit. The former Plaintiff's sought to avoid payment of the County occupational tax. The current Plaintiffs seek to avoid payment of

the occupational tax. Clearly, the former plaintiffs interests were "so closely aligned with (current plaintiffs) as to be their virtual representative."

If the former Plaintiffs had prevailed, the instant plaintiffs would rightfully claim res judicata in a subsequent suit against *them* to compel payment of the tax. Accordingly, there exists "a relationship between (former plaintiffs) and (current plaintiffs) so as a judgment in favor of (former plaintiffs) would have protected (current plaintiffs). The instant plaintiffs would have been protected had the *Bedingfield* Plaintiffs prevailed. Therefore, pursuant to the tests employed by the Alabama Courts, the instant plaintiffs are in privity with the *Bedingfield* parties.

4. SUBSTANTIALLY SAME CAUSE OF ACTION

Res judicata is a defense not only to the precise legal theory presented in the prior case, *but to all legal theories and claims arising out of the same nucleus of operative fact. Baker v. City of Guntersville, supra; NAACP v. Hunt,* 891 F.2d at 1561. The legal theories and claims in the instant case clearly arise from the same "nucleus of operative fact" as those asserted in *Bedingfield* (i.e. the levy of an occupational tax). All of the theories raised by current plaintiffs either were raised or *could have* been raised by former plaintiffs. The Alabama Courts have repeatedly held that res judicata bars any claim which *was* or *could have been* adjudicated in the previous action. *Dairyland, supra,* 566 So.2d at 725. *Hughes v. Allenstein,* 514 So.2d 858 (Ala. 1987).

In *NAACP v. Hunt, supra,* the Eleventh Circuit, applying Alabama res judicata law, held that a second suit to remove the confederate flag from the state capitol was barred by res judicata despite the fact that the second suit contained *new* constitutional and federal statutory claims which were not litigated in the prior case. The Court held that "[b]ecause (plaintiff) *could have* raised

the same First Amendment and section 1988 claims in the first action, the claims are identical. The action is thus precluded under res judicata." 891 F.2d at 1561.

It is immaterial that current plaintiffs seek money damages in addition to equitable relief. In *Robinson v. Holley,* 549 So.2d 1 (Ala. 1989), the Supreme Court held that a difference in requested relief is *not* grounds for distinguishing two causes of action for res judicata purposes. *Robinson I* involved the removal of an estate administration to the Elmore County Circuit Court in which the beneficiary received an adverse declaratory judgment and accounting. *Robinson II* was a suit in the Jefferson County Circuit Court wherein the same beneficiary brought a fraud action against the executor and trustee of the estate. The dismissal of the Jefferson County suit on res judicata grounds was affirmed by the Supreme Court which ruled that a plaintiff cannot escape the doctrine of res judicata by pleading different causes of action or asserting new elements of damages in a second suit. The court held:

> The basis of this rule is that a cause of action grows out of the wrongful action and not out of the various forms of damages that may flow from the single wrongful act. *Chappell v. Boykin,* 41 Ala. App. 137, 127 So.2d 636 (1960) cert denied, 271 Ala. 697, 127 So.2d 641 (Ala. 1961).

The Supreme Court has repeatedly held that the principal test to determine whether two suits involve substantially the same cause of action is whether the same evidence would support a recovery in both suits. *Garris v. South Alabama Production Credit,* 5367 So.2d 911 (Ala. 1989); *Dominex Inc. v. Key,* 456 So.2d 1047 (Ala. 1984); Wheeler v. First Alabama Bank, 364 So.2d 1190 (Ala. 1978). In *Garris,* the Court held:

> Regardless of the form of the action, the issue is the same when it is supported in both actions by

> *substantially* the same evidence. If it be so supported, a judgment in one action is conclusive upon the same issue in any suit, *even if the cause of action is different.*

537 So.2d at 914.

The evidence necessary to have Act 406 and Ordinance No. 1120 declared unconstitutional is the same today as it was when Bedingfield filed suit in 1987. The facts have not changed. The evidence available to the plaintiffs in the earlier case is *identical* to the evidence available to plaintiffs in the instant suit. The Alabama Supreme Court has already reviewed that evidence and determined that the tax is constitutional. Therefore, it is clear that the "substantially same evidence" test is satisfied despite the fact the instant plaintiffs have plead additional causes of action beyond those litigated in the earlier case.

CONCLUSION

As demonstrated above, there was (1) an earlier judgment on the merits; (2) by a court of competent jurisdiction; (3) the instant plaintiffs are in privity with the former plaintiffs; and (4) the issues in both suits are substantially the same. Res judicata bars the relitigation of all issues raised in the earlier case *and* all issues which could have been raised in that case. All of the claims asserted by Plaintiff *were or could have been* litigated by the *Bedingfield* plaintiffs. Therefore, this action is barred.

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully request the entry of summary judgment in their favor.

[Certificate of Service Omitted in Printing]

****

Act No. 406

Enacted at 1967 Regular Session of the Legislature of Alabama

[Title of Act Omitted in Printing]

Section 1. This Act shall apply to any county of the State of Alabama having a population of 500,000 or more, according to the last or any subsequent federal census, and to no other county.

Section 2. As used in this Act, the following words and terms have the meanings hereby ascribed to them; "the county" means a county subject to this Act; "the governing body" means the governing body of the county, whether it be a county commission, board of revenue or other governing body; "person" includes any natural person, corporation, firm, association or other entity; and "business" includes business, vocation, occupation, calling or profession; "license or privilege tax" shall not include any sales or use tax.

Section 3. The purpose of this Act is to equalize the burden of taxation by authorizing the county to impose a license or privilege tax upon persons now engaging in certain businesses without paying any license tax thereon to either the state or county.

Section 4. The governing body of the county is hereby authorized to levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county by any of the following Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended.

When a person is engaged in more than one business for one or more of which a license or privilege tax is required to be paid to the State or the county but for one or more of which no license or privilege tax is required

to be paid to the State or county, the county governing body shall have the authority to levy a license or privilege tax upon that business, or those businesses, for engaging in which such person is not required to pay any license or privilege tax to the State or county.

Section 5. The tax hereby levied shall be paid to that officer or employee of the county chargeable with the duty of collecting license or privilege taxes payable to the county.

Section 6. No license or privilege tax levied by the governing body of the county on any person, for engaging in any business shall be at a rate which is in excess of the rate of license or privilege tax levied by the largest municipality of the county on the same or similar type of business activity.

Section 7. It is hereby provided that all laws or parts of law in conflict with provisions of this Act are hereby repealed to the extent of such conflict.

Section 8. The provisions of this Act are severable; and should any part of this Act be declared unconstitutional or void, such declaration shall not affect the remaining provisions.

Section 9. This Act shall become effective upon its approval by the Governor or upon its otherwise becoming a law.

****

ORDINANCE NO. 1120

Adopted by the Jefferson County
Commission on September 29, 1987

An Ordinance to establish a license or privilege tax on persons engaged in any vocation, occupation, calling or profession in Jefferson County who is not required by law to pay any license or privilege tax to either the State of Alabama or the County as set out herein.

BE IT RESOLVED AND ORDAINED by the Jefferson County Commission as follows:

Section 1. DEFINITIONS. That the following words, when used in this Ordinance, shall have the meaning ascribed to them, except where the context clearly indicates or requires a different meaning:

(A) The word "person" shall mean any natural person. Whenever the word "person" is used in any clause prescribing and imposing a penalty in the nature of a fine or imprisonment, the work as applied to a partnership or other form of unincorporated enterprise shall mean the partners or members thereof, and as applied to corporations shall mean the officers and directors thereof.

(B) The words "vocation, occupation, calling and profession" shall mean and include the doing of any kind of work, the rendering of any kind of personal services, or the holding of any kind of position or job within Jefferson County, Alabama, by any clerk, laborer, tradesman, manager, official or other employee, including any nonresident of Jefferson County who is employed by any employer as defined in this section, where the relationship between the individual performing the services and the person for whom such services are rendered is, as to those services, the legal relationship of employer and employee, including also a partner of a firm or an officer of a firm or corporation, if such partner or officer receives a salary for his personal services rendered in the business of such firm or corporation, but they shall not mean or include domestic servants employed in private homes and shall not include businesses, professions or occupations for which license fees are required to be paid under any General License Code of the County or to the State of Alabama or the County by any of the following: Chapter 12, Article 2, Title 40; §§40-21-50, 40-21-52, 53, 54 and 55; 40-21-57, 58, 59, and 60; 40-16-6; and 27-4-9 of the Code of Ala. 1975, as amended.

(C) The words "vocation, occupation, calling and profession" shall also mean and include the holding of any kind of office or position either by election or appointment, by any federal, state, county or city officer or employee where the services of such official or employee are rendered within Jefferson County, Alabama.

(D) The word "employee" shall mean and include any person engaging in or following any vocation, occupation, calling or profession within the meaning of subsection (B) of Section 1 of this Resolution and Ordinance.

(E) The word "employer" shall mean and include any person, business, firm, corporation, partnership, association or any other kind of organization who or that employs any person in any vocation, occupation, calling or profession in Jefferson County, Alabama, within the meaning of subsection (B) of Section 1 of this Ordinance.

(F) The words "gross receipts" and "compensation" shall have the same meaning, and both words shall mean and include the total gross amount of all salaries, wages, commissions, bonuses or other money payment of any kind, or any other consideration having monetary value, which a person receives from or is entitled to receive from or be given credit for by his employer for any work done or personal services rendered in any vocation, occupation, calling or profession, including any kind of deductions before "take home" pay is received; but the words "gross receipts" and "compensation" shall not mean or include amounts paid to traveling salesmen or other workers as allowance or reimbursement for traveling or other expenses incurred in the business of the employer, except to the extent of the excess of such amounts over such expenses actually incurred and accounted for by employee to the employer.

(G) The word "licensee" shall mean and include any person required to file a return or to pay a license fee under this ordinance.

(H) The word "county" shall mean Jefferson County, Alabama.

(I) The words "Director of Revenue" shall mean the Director of Revenue of Jefferson County, Alabama.

(J) The singular shall include the plural and vice versa, and the masculine shall include the feminine and the neuter.

Section 2. LICENSE FEES REQUIRED. It shall be unlawful for any person to engage in or follow any vocation, occupation, calling or profession as defined in Section 1 within the County on and after the 1st day of January, 1988, without paying license fees to the County for the privilege of engaging in or following such vocation, occupation, calling or profession, which license fees shall be measured by one-half percent (1/2%) of the gross receipts of each such person.

Section 3. WHERE WORK DONE OR SERVICES PERFORMED BOTH WITHIN AND WITHOUT THE COUNTY. In cases where compensation is earned as a result of work done or services performed both within and without the county, the license fees required under this Ordinance shall be computed by determining upon the Oath of the employer, or if required by the Director of Revenue upon the oath of the employee, that percentage of the compensation earned from the proportion of the work which was done or performed within the County.

Section 4. EMPLOYERS TO WITHHOLD LICENSE FEES AND FILE RETURNS. Each employer shall deduct from each payment due each employee the amount of the license fees measured by one-half per centum (1/2%) of the compensation due each employee beginning on the 1st day of January, 1988. The payments required

to be made on account of such deductions by employers shall be made monthly to the County for the monthly periods ending January 31, February 28, March 31, April 30, May 31, June 30, July 31, August 31, September 30, October 31, November 30 and December 31st of each year, on or before the twentieth day of the month next following the end of each such monthly period, and each employer shall at the same time make a return in connection therewith on a form made available to such employer by the Director of Revenue at the office of the Director of Revenue, provided that, if the total amount deducted from payments made to or due all employees of an employer is less than fifty ($50.00) dollars during each calendar month of the previous calendar year, then such employer may elect, for the current calendar year, to remit such deductions to the County for the quarterly periods ending March 31st, June 30th, September 30th and December 31st of such following calendar year, on or before the twentieth day of the month next following the end of each such quarterly period, and each such employer shall at the same time make a return in connection therewith on a form made available to such employer by the Director of Revenue at the office of Director of Revenue. Provided, however, that the failure or omission by any employer to deduct such license fees shall not relieve an employee from the payment of such license fees and compliance with the requirements for making returns as provided in this Ordinance, or with any regulations promulgated under this Ordinance. Each employer shall file in the office of the Director of Revenue on or before January 31, of each year a return on a form made available by said Director of Revenue, at the office of said Director of Revenue, which return shall show the gross amount of compensation of each employee, the amount of license fees deducted and paid by such employer for all or any part of the preceding calendar year and the last known address of each such employee. Each employer shall keep accurate records of all such compensation, deductions, license fees, payments and returns. Such records shall be kept and maintained by each such employer for not less than five (5) years subsequent to the date such compensation was earned.

Section 5. RETURNS TO BE FILED BY EMPLOYEES. When a monthly or quarterly return, as required by Section 4 hereof is not filed by an employer and the license fees are not paid to the County by such employer monthly as herein provided, the employee for whom no return has been filed and no payment has been made shall file a return with the Director of Revenue on or before the 1st day of the second month next following the end of each such monthly or quarterly period, showing in said return his gross receipts subject to license fees for such month or quarter, and he shall also file a return with the Director of Revenue on or before January 31st of each year thereafter in which his employer has failed to file any monthly or quarterly return required in the preceding calendar year, showing on said return the gross receipts subject to license fees during the preceding calendar year. If for any reason all license fees of a person subject to the provisions of this Ordinance were not withheld by his employer from his gross receipts, such person shall file each return required by this Section on a form obtainable at the office of the Director of Revenue. In addition to the gross receipts earned by him, such return shall show such other pertinent information as may be required by the Director of Revenue. Each person making a return required by the Section shall, at the time of filing thereof, pay to the County the amount of license fees due under this Ordinance; provided, however, that any portion of the license fees deducted at the source shall be deducted on the return and only the balance, if any, shall be due and payable at the time of

filing said return. Each employee shall keep accurate records of all such compensation, deductions, license fees, payments and returns. Such records shall be kept and maintained by each such employee for not less than five (5) years subsequent to the date such compensation was earned.

Section 6. DUTIES OF THE DIRECTOR OF REVENUE. It shall be the duty of the Director of Revenue to collect and receive all license fees imposed by this Ordinance and to keep records showing the amounts received by him from each employer. All moneys received by the Director of Revenue shall be deposited in a duly approved depository.

Section 7. INVESTIGATIVE POWERS OF THE DIRECTOR OF REVENUE. The Director of Revenue or any agent or employee designated by him is hereby authorized to examine the books, papers and records of any employer or supposed employer, or of any license or supposed license, in order to determine the accuracy of any return made, or if no return was made to ascertain the amount of license fees due under the terms of this Ordinance by such examination. Each such employer or supposed employer or licensee or supposed licensee shall give to the Director of Revenue, or to his duly authorized agent or employee, the means, facilities and opportunities for the making of such examination and investigation. The Director of Revenue is hereby authorized to examine any person under oath concerning any gross receipts which were or should have been shown in a return, and to this end he may compel the production of books, papers, records and the attendance of all persons before him, whether as parties or as witnesses, whom he believes to have knowledge of such gross receipts or compensation.

Section 8. REGULATIONS MAY BE PROMULGATED. The Director of Revenue may prescribe, adopt,

promulgate and enforce reasonable rules and regulations not in conflict with this Ordinance relating to any matter or thing pertaining to the administration and enforcement of the provisions of this Ordinance, including but not limited to provisions for the re-examination and correction of returns as to which overpayment or underpayment is claimed or found to have been made, and the regulations so promulgated shall be binding upon all licensees and employers.

Section 9. INFORMATION TO BE CONFIDENTIAL. Notwithstanding any resolutions and ordinances to the contrary, any information gained by the Director of Revenue or any other official or agent or employee of the County as a result of any returns, investigations, hearings, or verifications required or authorized by this Ordinance shall be confidential, except for official purposes, or in accordance with proper judicial order, or the enforcement of this Ordinance, and any person or agent divulging such information, except as herein permitted, shall upon conviction be subject to a fine of not more than One Hundred Dollars ($100.00) or to imprisonment of not exceeding thirty (30) days, or to both such fine and imprisonment.

Section 10. INTEREST AND PENALTIES.

(A) All license fees imposed by this Ordinance which are delinquent, that is, which remain unpaid after they become due shall, subject to the provisions hereinafter set out, bear interest at the rate of twelve percentum (12%) per annum, and any person who has failed to pay such license fees when the same became due shall, subject to the provisions hereinafter set out, also be charged a penalty of ten percentum (10%) of the amount of such unpaid license fees. Any person or employer who fails or refuses to withhold any license fees payable under this Ordinance, or who fails to pay such fees after withholding the same to the County at the time it is due, as pro-

vided under the provisions of Section 4 hereof, shall become liable to the County for such fees, as well as for the interest thereon at the rate of twelve percentum (12%) per annum, and for the aforesaid penalty. Provided, however, that the minimum penalty imposed against such person or employer shall be Three Dollars ($3.00). Provided the Director of Revenue, if a good and sufficient reason is shown for the failure to pay the tax within the time required, may waive or remit the penalty and interest, or a portion of either, upon payment of the tax due.

(B) Any person or employee who shall fail, neglect or refuse to pay a license fee as by this Ordinance required, or any employer who shall fail to withhold said license fees, or to pay over to County such license fees, penalties or interest imposed by this Ordinance, or any person required to file a return under the provisions of Section 5 of this Ordinance, who shall fail, neglect or refuse to file such return, or any person or employer who shall refuse to permit the Director of Revenue or any agent or employee designated by him, in writing, to examine his books, records and papers for any purpose authorized by this Ordinance, or who shall knowingly make any incomplete, false or fraudulent return, or who shall attempt to do anything whatever to avoid the full disclosure of the amount of gross receipts or compensation in order to avoid the payment of the whole or any part of a license fee, shall upon conviction be subject to punishment within the limits of and as provided by law for each offense. Such punishment shall be in addition to the penalties imposed under subsection (A) of this section.

Section 11. EXTENSION OF TIME FOR MAKING RETURN. The Director of Revenue, for good cause, may extend the time for making any return required under the provisions of this Ordinance, but the time for filing any such return shall not be extended for a greater period than thirty (30) days from the day such return is due

to be made and shall not prevent penalty and interest from accruing during the period of such extension.

Section 12. USE OF LICENSE FEES. All money derived from license fees under the provisions of this Ordinance shall be paid to the General Fund of the County and expended as authorized by law.

Section 13. SEVERABILITY. The provisions of this Ordinance are severable. If any provision, section, paragraph, sentence or part thereof, or the application thereof to any employer or licensee or class or persons, shall be held unconstitutional or invalid, such decision shall not affect or impair the remainder of the Ordinance, it being the legislative intent to ordain and enact each provision, section, paragraph, sentence and part thereof, separately and independently of each other.

Section 14. REPEAL OF RESOLUTION AND ORDINANCES. All resolutions and ordinances or parts of resolutions and ordinances in conflict with this Ordinance are to the extent of such conflict hereby repealed.

Section 15. EFFECTIVE DATE. This Ordinance shall be in full force and effect on and after January 1, 1988, and from year to year thereafter, until repealed.

****

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
IN EQUITY

HOYT BEDINGFIELD, JR., individually and in his capacity as Acting Director of Finance of the City of Birmingham, and THE CITY OF BIRMINGHAM, *Plaintiffs,*	)	CIVIL ACTION NO.
v.	)	
JEFFERSON COUNTY, ALABAMA, REUBEN DAVIS, JIM GUNTER, JOHN KATAOPODIS, CHRIS McNAIR, and DAVID ORANGE in their official capacities as Commissioners of Jefferson County, *Defendants.*	)	

VERIFIED COMPLAINT

1. This is a complaint for a declaratory judgment and other equitable relief.

2. This action is brought pursuant to the Alabama Declaratory Judgments Act, *Ala. Code* § 6-6-220 *et seq.* (1975), and Rules 57 and 65, Alabama Rules of Civil Procedure, for a declaratory judgment that Ordinance No. 1120 adopted by the Jefferson County Commission is void and invalid, and if necessary, that Act No. 406 passed by the Alabama Legislature in 1967 and approved by the Governor on September 7, 1967, is void and invalid to the extent that it supports any comprehensive occupational tax on all persons working in Jefferson County. *Ala. Code* § 6-6-223 specifically authorizes the declaratory judgment with respect to such statutes and ordinances. Plaintiffs allege that there is presently uncertainty and insecurity as to the rights and legal relations of

the parties, as to the matters at issue in this action, and that a declaratory judgment is needed to determine those rights and legal relations.

3. Venue is proper in this Court.

4. Attached hereto as Appendix "A" is Ordinance No. 1120 adopted by the Jefferson County Commission on or about the 29th day of September, 1987 to be effective January 1, 1988. Said ordinance purports to establish a licensed or privileged tax on persons engaged in any vocation, occupation, calling or profession in Jefferson County who is not required by law to pay any licensed or privileged tax to either the State of Alabama or the County.

5. It is the well established law in Alabama that county governments lack the authority to impose taxes unless specifically authorized by the Legislature.

6. The defendants or some of them have publicly contended that Ordinance No. 1120 is authorized by Act 406 adopted by the Alabama Legislature in 1967 and approved by the Governor on September 7, 1967. A copy of that Act is attached as Appendix "B".

7. During the 1987 regular session of the Alabama Legislature, the defendants recognized that they did not have authority to enact a comprehensive occupational tax like the one purported to be adopted in Ordinance No. 1120, and the defendants, or most of them, had proposed in the Alabama Legislature House Bill No. 941, purporting to give them the authority to adopt an occupational tax. A copy of that bill is attached as Appendix "C". It failed to pass the Alabama Legislature.

8. If put into effect, Ordinance No. 1120 would have a dramatic effect upon the plaintiffs. First with respect to plaintiff Bedingfield individually, the occupational tax would be taken from his salary. Second, plaintiff Bedingfield, as acting Director of Finance of the City of Birmingham, needs an immediate declaration as to

whether Ordinance No. 1120 is valid or constitutional. Plaintiff Bedingfield must take steps immediately to implement a system to withhold taxes from employees of the City under Ordinance No. 1140. If said Ordinance is not valid, then it would be improper for him to withhold the tax from the many employees of the City. Third, and more importantly, the occupational tax would exacerbate the problems faced by the City of Birmingham, and its residents, in attracting and maintaining jobs, especially in light of the strong competition faced by it from areas such as north Shelby County in attempting to recruit jobs, especially higher paying jobs, from the City of Birmingham and into the suburban area of north Shelby County. The effect of Ordinance 1120 would be not only taking jobs from the City of Birmingham but also to erode the tax base and to otherwise harm the City and the residents of the City of Birmingham.

9. Plaintiffs need an immediate determination and a preliminary injunction against the enforcement of Ordinance No. 1120. Without such a determination and preliminary injunction, plaintiffs would suffer irreparable harm. First, plaintiff Bedingfield and the City of Birmingham will have to incur the cost of establishing and implementing a system to withhold taxes from employees of the City. If the Ordinance No. 1120 is illegal or unconstitutional, then plaintiff Bedingfield and the City of Birmingham would be acting improperly in withholding taxes from employees of the City, and may face claims against them for doing so. If he refuses to withhold, then he faces possible criminal prosecution under §10 of Ordinance No. 1120.

10. Plaintiffs offer to do equity.

CLAIM ONE

10. Paragraphs 1 through 9 are hereby realleged and incorporated herein.

11. Under Art. IV § 44 and Art. XI § 212 of the Constitution of Alabama of 1901, Ordinance No. 1120 is an unconstitutional effort by the Jefferson County Commission to impose a tax upon the citizens of Jefferson County and those working in Jefferson County.

CLAIM TWO

12. Paragraphs 1 through 11 are hereby realleged and incorporated herein.

13. Ordinance No. 1120 is not authorized by Act 406 and is therefore an unauthorized attempt by the Jefferson County Commission to impose a tax upon the citizens of Jefferson County and those working in Jefferson County.

CLAIM THREE

14. Paragraphs 1 through 13 are hereby realleged and incorporated herein.

15. If Ordinance No. 1120 were authorized by Act 406, then Act 406 is unconstitutional based upon any one of the following grounds:

A. Act 406 is unconstitutional local legislation under Article IV, §§ 104(15) and 105 of the Constitution of Alabama of 1901.

B. Act 406 is a violation of the equal protection requirements and provisions of the federal and state constitution.

C. If Act No. 406 were construed to give the defendants the authority to adopt Ordinance No. 1120, then Act 406 is unconstitutional under Article IV, § 45 of the Constitution of Alabama of 1901 because the title of the bill is not sufficiently descriptive to support a comprehensive occupational tax and the title is not consistent with the content of the act.

D. If Act No. 406 were construed to give the defendants the authority to adopt Ordinance No. 1120, then

Act No. 106 is unconstitutional under Article IV, §§ 45 and 71 of the Constitution of Alabama of 1901 in that the law contains more than one subject.

E. Act No. 406 is vague and ambiguous and therefore is a violation of the due process requirements of the state and federal constitution.

WHEREFORE, plaintiffs demand judgment against defendants and request this Court:

A. To declare that Ordinance No. 1120 is void, invalid, and unconstitutional and to issue preliminary and final injunctive relief prohibiting the enforcement of said ordinance;

B. To the extent necessary to declare that Act 406 is invalid, void, and unconstitutional and to issue appropriate injunctive relief prohibiting its enforcement;

C. To issue such other and further relief as may be appropriate and necessary under the circumstances.

[Subscription of Attorney and Jurat Omitted in Printing]

* * * * * * *

IN THE CIRCUIT COURT
FOR
JEFFERSON COUNTY, ALABAMA

CAROLYN PHILLIPS,	)	
JOHN ROGERS,	)	
DALE PATTON	)	
PLAINTIFFS,	)	CASE NO.
	)	CV 87-504-469 JDC
VS.	)	
	)	
THE JEFFERSON COUNTY	)	
COMMISSION	)	
DEFENDANT.	)	

AMENDED AND VERIFIED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

Filed November 4, 1987

1. This is a suit for declaratory and injunctive relief against the action of the Jefferson County Commission levying an occupational tax on employees of Jefferson County.

PARTIES

2. Plaintiffs Carolyn Phillips, John Rogers, Dale Patton are over the ages of nineteen (19) years, employees within Jefferson County, and reside in Jefferson County, Alabama.

3. Plaintiffs bring this action in their individual capacity.

4. Defendant, the Jefferson County Commission is the County's governing body established pursuant to Federal Decree of 1985 in the case of Taylor, et al. v. Jefferson County Commission and otherwise governed by the general laws of Alabama.

FACTUAL ALLEGATIONS

5. On September 29, 1987, Defendant adopted a resolution levying a county-wide occupational tax to take effect January 1, 1988.

6. Defendant followed Act No. 406 of 1967 State of Alabama as authority to impose said occupational tax.

7. Act No. 406 of 1967 authorizes the governing body of any county of the State having a population of 500,000 or more, according to the last or and subsequent Federal Census, to levy a business or privilege tax upon any business, vocation, occupation, calling or profession for which a license or privilege tax is not required for either the State of Alabama or the county by the laws of the State of Alabama, and to limit the amount of any such business or privilege tax.

8. Act No. 406 of 1967, State of Alabama, was enacted as a general law.

9. Section 110 of the Constitution says: "A general law within the meaning of this Article is a law which applies to the whole state; a local law is a law which applies to any political subdivision or subdivisions of the State less than the whole; a special or private law within the meaning of this Article is one which applies to an individual, association, or corporation."

10. Plaintiffs aver that Act No. 406 of 1967 is not a general law because of its arbitrary classification. For Act No. 406 to be a "general" law, it must have application to a shifting class; there must be a possibility of application to other counties within the classification fixed by the statute. Act No. 406 of 1967 applies ostensibly to Jefferson County and does not apply to any other county in the State of Alabama.

11. Section 106 of the Constitution provides that no local, special, or private law shall be passed on any subject without giving the notice as there prescribed, and makes it the mandatory duty of the Courts to declare the same void if the journals do not affirmatively show that it was passed in accordance with the Section.

12. Act No. 406 of 1967, although passed as a general law under Section 110 of the Constitution, is a local law and is due to be held void on the basis that the journals do not reflect that there was notice of said Act as required by Section 106 of the Constitution of Alabama.

13. Plaintiff avers that Act No. 406 of 1967 is constitutionally offensive because the classification restriction to counties with a population of 500,000 or more residents does not bear a reasonable relationship to the purpose of the law. Such classification is arbitrary and results in a violation of the Constitution of Alabama and of the United States. There is no logical relationship between the population contained in said Act and the purpose as set out in Section One of said Act.

14. Plaintiffs aver that Act No. 406 of 1967 should be declared void for vagueness, inasmuch as its language appears to tax certain persons and not tax others. Equally, said Act contains a reference to establishing as a benchmark the rate of license or privilege tax levied by the largest municipality in the county.

15. Plaintiffs aver that reference to said Act No. 406 of 1967 authorizing the county to levy a business or license fee on those businesses that are not licensed by the county or State shows an intention by the Legislature to avoid other taxes such as the occupational tax the Defendant has adopted to take effect January 1, 1988.

16. Plaintiffs allege that the Defendant is due to be enjoined from levying an occupational tax because said tax, effective January 1, 1988, will subject their wages to confiscation without due process of law as required by the Constitution of Alabama and of the United States.

17. Plaintiffs allege that Act No. 406 of 1967 adopted by the Defendant constitutes a denial of equal protection in violation of the Fourteenth Amendment of the United States Constitution. Said Act exempts professional occupations required by State law to be licensed but does not exempt other professional or nonprofessional occupations.

18. Plaintiffs request an expedited hearing of this matter.

19. Plaintiffs allege that they are entitled to Attorney fees under 42 U.S.C. 1988 with respect to civil rights claims.

WHEREFORE, for the above reasons Plaintiffs pray that this Court will assume jurisdiction and enter a judgment as follows:

1. That this Court award a reasonable Attorney fee to Plaintiff's lawyers as prevailing parties pursuant to 42 U.S.C. 1988.

2. Enter an Order finding that Act No. 406 of 1967 was not intended to authorize Defendant to levy any tax other than on "businesses" that, on its effective date, did not pay a license or privilege tax to the state or county and permanently enjoin Defendant from levying an occupational tax on Plaintiffs.

3. Enter an Order finding that Act No. 406 of 1967 is void on its face by not comporting to the requirements of Section 106 of the Alabama Constitution which requires that the journal of both House and Legislature contain a showing of notice and proof of advertising.

4. Enter an Order finding that the population classification contained in Act No. 406 of 1967 does not bear a reasonable relationship to the purpose of said Act and it therefore a local law void on its face in violation of Section 106 of the Alabama Constitution.

5. Enter an Order finding that Act No. 406 of 1967 violates the due process clause of the Constitution of the United States by denying Plaintiffs their right to equal protection.

6. Enter an Order finding that Act No. 406 of 1967 is void for vagueness and is unconstitutional on its face.

7. Enter an Order granting such other relief as the Court may deem proper.

8. Enter an Order taxing cost against Defendant.

[Subscription of Attorney, Jurat and Certificate of Service Omitted in Printing]

* * * * * * *

IN THE TENTH JUDICIAL CIRCUIT COURT
JEFFERSON COUNTY, ALABAMA
IN EQUITY

HOYT BEDEINGFIELD, JR., et al.,	)	
Plaintiffs,	)	CIVIL ACTION NO.
v.	)	87-504-465 JDC
JEFFERSON COUNTY, ALABAMA, et al.,	)	
Defendants.	)	

CITY PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW ON EQUAL PROTECTION AND ALABAMA CONSTITUTION SECTION 105

The City Plaintiffs' here present argument to supplement that already submitted to the Court by their

PREHEARING MEMORANDUM. The purpose of this memorandum is to focus the Court's attention on the applicability of Alabama Constitution Section 105 and the Equal Protection provisions of the federal and Alabama Constitutions.

The City's argument is two-tiered. Firstly, Act 406 is infirm as an attempt by the legislature to grant special or "local" taxation powers to Jefferson since no rational basis exists for distinguishing Jefferson from other County's within Alabama. Secondly, the above argument is augmented by Section 105 considerations.

We will develop these arguments, in tandem, below.

PEDDYCOART and EQUAL PROTECTION

In the area of statutory grants of authority to municipalities or counties based upon population classifications, there must exist a reasonable relationship between the statute's purpose and the population classification established. If not, the classification will be deemed arbitrary and the statute must fail under Equal Protection scrutiny. *Dearborn v. Johnson*, 234 Ala. 84, 173 So. 864 (1937); *Peddycoart v. City of Birmingham*, 354 So.2d 808, (Ala. 1978).

In our case here, we do not have to surmise about the possible purpose of Act 406, the *purpose* of the act is quite clearly and simply set out in Section 3 of the act, viz:

> "Section 3. The *purpose* of this Act is to *equalize the burden of taxation* by 'authorizing the county to impose a license or privilege tax *upon persons now engaging in certain businesses without paying any license tax thereon* to either the state or county." (emphasis inserted) Act 406 of the 1967 Regular Session of the Alabama Legislature.

Section 4. goes on to identify those "certain businesses".

> "Section 4. The governing body of the county is hereby authorized to levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county *by any of the following Article 1, Chapter 20 Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended.*" (emphasis inserted) Act 406 of the 1967 Regular Session of the Alabama Legislature.

The obvious purpose of the Act was to reach those businesses that were enjoying a "free ride" by operating within Jefferson County with no obligation to pay business license fees. Under the Act, those businesses could be required to assume tax responsibility comparable to other businesses falling subject to license taxation under the "general laws" set forth within Section 4.

The critical determination for this Court is whether the population classification recited in the statute, (i.e, 500,000 or more) bears any relationship to the statute's purpose, and then further, whether that relationship is a reasonable one. *Peddycoart*, supra.

Unmistakably, the statute's emphasis and direction is focused upon *then-unlicensed businesses*. There is no indication that any need for revenue by Jefferson County supplied any part of the legislative motivation.

The analysis, then, for application of Equal Protection, should focus on whether there is a reasonable relationship between taxing previously unlicensed businesses and counties with populations numbering 500,000 or more. We say there is not. There is no articulable distinction, except *bare location* of operation, between unlicensed businesses operating in Jefferson County and those operating in any of the other 66 counties within the state.

For example, Court Reporters are taxed under County Ordinance No. 1 (the 1968 ordinance that implemented

the authority granted under Act 406 (See Richie depo., PX.1)). There is no basis for singling out Court Reporters operating in Jefferson County and subjecting them to additional taxation while their Montgomery County counterparts remain unaffected.

The irrationability of the statute's classification is enhanced by the fact that it does not require those "certain businesses" to do anything, but gives the County the *authority*, exercisable at the discretion of the County's governing body, to levy the tax as it deems appropriate.

SECTION 105 APPLICABILITY

Additionally, the Act violates Section 105 of the Alabama Constitution. That provision prohibits local legislation that invades the province of existing general laws on the subject.

> (N)o . . . local law, . . . shall be enacted in any case which is provided for by a general law, . . . nor shall the legislature indirectly enact any . . . local law by the partial repeal of a general law" Section 105, Alabama Constitution.

Local and general laws are defined in Section 110 of the Alabama Constitution (as last amended by Amendment No. 397)

> "Sec. 110. "General law" "local law" and "special law" defined.
>
> A *general law* is a law which in its terms and effect applies either to the whole state, or to one or more municipalities of the state less than the whole in a class. . . .
>
> A special or private law is one which applies to an individual, association or corporation. A *local law* is a law which is not a general law or a special or private law . . . ". (emphasis inserted)

In *Crandall v. City of Birmingham*, 442 So.2d 77 (Ala. 1983), the Alabama Supreme Court, relying upon the rationale of *Peddycoart*, supra., struck down the City of Birmingham's 90-day claim/notice statute contained in Section 659 of old Title 62, Code of Alabama 1940 (Recompiled 1958), citing that at the time of passage of Section 659, a general law (now Alabama Code Section 11-47-23) "already existed and addressed the same subject" for all Alabama municipalities. *Crandall*, at 80. The Court declared that:

> "We hold that s659, a local law, is unconstitutional under Art. IV, s105, of the Constitution because it was enacted at variance with an already existing general law on the same subject." id. at 80.

Our Act 406 is likewise infirm in that it seeks to cover legislative ground already preempted by a general law. At the time of passage of Act 406 in 1967, there was already in existence a scheme of general laws on the subject of licensing businesses and professions operating within the various counties of Alabama. (ie. Article 1, Chapter 20, Title 51; the predecessor statute to Article 2 of Chapter 12, Title 40 Code of Alabama 1975)

Prior to setting forth, at s41-12-41 *et seq.*, an enumeration of businesses and professions covered, that Article declares:

> *"s40-12-40. Who must procure state and county licenses.*
>
> Every person, firm, company, corporation or association, receiver or trustee, but not a governmental subdivision, engage in any business, vocation, occupation, calling or profession herein enumerated or who shall exercise any privilege hereinafter described for which a license or privilege tax is required shall first procure a state license, and a county license when so required, and shall pay for the same or shall pay for the exercise of such privi-

lege the amounts hereinafter provided, and comply with all other provisions of this title."

The provisions of Title 40, Chapter 12 contain a comprehensive scheme for the license and privilege taxation, by counties and the state, of businesses and professions in Alabama. In fact, Section 40-12-3 requires that any tax collected, where both a county tax and state tax are levied under Article 2, shall be distributed one-half to the county and one-half to the state.

We argue that the Court's task here is completely analogous to the *Crandall* case. Act 406 is unquestionably a "local act" which seeks to establish, in Jefferson County alone, *who must procure a county business license.* In exhaustive and comprehensive fashion, that subject is already covered by general law.

For the foregoing reasons, these plaintiffs urge the Court to find this case indistinguishable from *Peddycoart* and *Crandall* and declare Ordinance 1120 invalid as an unconstitutional exercise of legislative authority.

[Subscription of Attorney and Certificate of Service Omitted in Printing]

* * * * * * * *

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

HOIT BEDINGFIELD, JR. and CAROLYN PHILLIPS,	*	
	*	
Plaintiff		
	*	Civil Action Nos. CV-87-504-465 JDC
vs.	*	CV-87-504-469 JDC
JEFFERSON COUNTY COMMISSION,	*	
Defendants.	*	

ORDER

Filed November 23, 1987

It is ORDERED that these actions shall be consolidated; and it is further

ORDERED that all discovery shall be completed not later than November 18, 1987, and that this matter be set for hearing on the merits at 9:00 a.m. on December 2, 1987.

DONE this 18th day of November, 1987.

BRAXTON L. KITTRELL, JR.
Circuit Judge

* * * * * * * *

IN THE CIRCUIT COURT
TENTH JUDICIAL CIRCUIT OF ALABAMA

HOYT BEDINGFIELD, JR., et al.,	)	
	)	
Plaintiffs,	)	
	)	Case No.
vs.	)	87-504-465 JDC
	)	
JEFFERSON COUNTY, ALABAMA, et al.,	)	
	)	
	)	
Defendants.	)	
CAROLYN PHILLIPS, et al.,	)	
	)	
Plaintiffs,	)	
	)	Case No.
vs.	)	CV87-504-469
	)	JDC
THE JEFFERSON COUNTY COMMISSION,	)	
	)	
	)	
Defendants.	)	

ORDER

Filed December 14, 1987

This matter was submitted to the Court on a stipulation of counsel, and testimony heard in open Court at a hearing on the merits.

The Court is faced with two major issues in these lawsuits. First, is Act No. 406, of the 1967 Regular Session of the Legislature of Alabama, constitutional; and second, is Ordinance No. 1120, adopted by the Jefferson County Commission on September 29, 1987, validly authorized by Act No. 406.

Plaintiffs argue that Act No. 406 is unconstitutional as violative of the provisions of the *Constitution of Alabama* of 1901 at Section 104 (15), which bars "local or special legislation regulating the assessment or collection of taxes"; at Section 105, which bars enactment of local laws where a general law exists; at Section 45, which bars legislation containing more than one subject; and at Sections 44 and 212, which bar an unlawful delegation of legislative authority.

The Courts have long held that there is a distinction between the terms "assessment" and "levy" and held that "assessment," as used in Subdivision (15), relates to property taxes rather than privilege taxes. *Opinion of the Justices*, 266 Ala. 363, 369, 96 So.2d 634 (1957) (quoting *Standard Oil Co. vs. Limestone County*, 220 Ala. 231, 234-235, 124 So. 523 (1929). In addition, Act No. 406 authorizes the county governing body to *levy*, not assess, taxes.

The Alabama Supreme Court has interpreted that Section 105 "was not intended to prevent the enactment of a local law on a subject already covered by a general law, when the local law is substantially different from the general law." *Peddycoart vs. City of Birmingham*, 354 So.2d 808, 812 (Ala. 1978). In an explanation of that interpretation, the Court has stated, "Courts are charged with the duty to determine whether there is a substantial difference between the general and local law...." *Peddycoart vs. City of Birmingham*, 354 So.2d 808, 812 (Ala. 1978) (quoting *Standard Oil Co. vs. Limestone County*, 220 Ala. 231, 235, 124 So. 523, 526 (1929). That same Court held:

> "If, in the judgment of the Legislature, local needs demand additional or supplemental laws substantially different from the general law, the Legislature has power to so enact." *Peddycoart vs. City of Birmingham*, 354 So.2d 808, 812 (Ala. 1978) (quoting *Standard Oil Co. vs. Limestone*

County, 220 Ala. 231, 235, 124 So. 523, 526 (1929).

While the *Peddycoart* court eventually overruled all prior interpretations of Section 105 and "prohibited the enactment of a local act when the subject is already subsumed by the general statute", it specifically noted that such new interpretation would be prescriptive, leaving pre-*Peddycoart* legislation under the old interpretations.

Plaintiffs cite Section 40-12-1 *et seq., Code of Alabama* 1975 as a general law governing license taxes, and maintain that this law governs license taxes to be levied by counties. *Code of Alabama* 1975, at Section 40-12-3, allows counties to levy license taxes for *school purposes*. Act No. 406 authorizes the county to levy a license or privilege tax for general county purposes. Statutory construction is subject to the rule that statutes should be construed as a whole to determine legislative intent. *Green v. Fairfield City Bd. of Education*, 365 So.2d 1217 (Civ.App. 1978). Nothing in Section 40-12-1 *et seq* prohibits the legislature from authorizing counties to levy license or privilege taxes for other than school purposes. "Power denied to local governments is reserved to the State Legislature; and subject only to constitutional proscriptions, the legislature is free to determine policy and enact local laws accordingly." *Drummond Co. vs. Boswell*, 346 So.2d 955, 958 (1977). The Court further stated it is not the broad, overall subject matter which is scrutinized to determine whether a local act, taken together with the general law, is violative of constitutional provisions prohibiting enactment of special, private or local laws in any case which is provided for by general law. *Drummond Co.* at 958. Rather, the Court must determine whether the object of the local law is to accomplish an end not substantially provided for and effectuated by general law. *Drummond Co.* at 958. Act No. 406 accomplishes an end not otherwise provided for by Section 40-12-1 *et seq.* and, therefore, is not violative of the constitutional proscription on this ground.

Act No. 406 does not contain, on its face, any provisions relative to enforcement of the other provisions of the act. If it did contain enforcement provisions, such provisions would not necessarily violate the constitutional proscription on multi-subject legislation. The Supreme Court has said that the legislative purpose in requiring single subject legislation is laudatory, but it is met when the separate provisions of a bill germane to the bill's general purpose. *Thomas v. Niemann*, 397 So.2d 90, 93 (1980). Included in the concept of levying a tax and clearly related is the idea that enforcement provisions would follow.

As to the delegation of legislative authority, "the levying of a tax is a purely legislative power, while duties of various officers in relation to assessment and collection of taxes are ministerial and sometimes judicial. *Opinion of the Justices*, 291 Ala. 262, 265, 280 So.2d 97 (1973). A bill authorizing the governing body of any county . . . to levy a privilege tax is not a violation of Section 212 of our Constitution. Id at 266. This Court finds nothing in Act No. 406 which is repugnant to the *Constitution of Alabama* of 1901, and which would invalidate the act. The provisions of Ordinance No. 1120, to the extent that they follow Act No. 406, are likewise valid.

The Court is not persuaded by the plaintiffs' contention that Act No. 406 does not authorize an occupational tax. The Act itself provides that the term "business" includes "business, vocation, occupation, calling or profession", and further provides that the governing body of the county is authorized to levy a license or privilege tax upon any "person" engaging in any business for which he is not required by law to pay any license or privilege tax either to the State of Alabama or the county.

The Court is also not persuaded by the plaintiff's argument that the construction of Act No. 406 prohibits the adoption of Ordinance 1120. As the defendants note in their brief, there is no requirement within Act No. 406 or any other law which requires an immediate "use it or lose it" implementation by the county. The fact that certain officials may have placed a different interpretation upon Act No. 406 will not operate to preclude its implementation by the county.

As Act No. 406 does not authorize portions of Ordinance No. 1120, such as criminal sanctions, reporting requirements, interest and penalties, it would at first appear that those provisions are due to be severed. But the Supreme Court of Alabama, in the case of the *Town of Hackleburg v. Northwest Alabama Gas District*, 277 Ala. 355, 170 So.2d 792 (1965), noted:

> Municipalities have no inherent power of taxation, but the State, having the power to tax may confer and delegate this power on and to a municipality. Stein v. Mayor, etc., of Mobile, 24 Ala. 591; Estes v. City of Gadsden, 266 Ala. 166, 94 So.2d 744. If the taxing power delegated is not limited, it includes all the taxing power possessed by the State. See McQuillin, Municipal Corporation, 3rd Ed., Vol. 16, Sec. 44.07.

The Court finds nothing in Act No. 406 which is repugnant to the *Constitution of Alabama* of 1901 and which invalidates the Act, nor does it find that Ordinance No. 1120 is invalid. The wisdom of and the necessity for this tax are matters for the determination of the county governing body. It has chosen to adopt this tax and this Court finds that its action in so doing is authorized by the constitution and laws of the State of Alabama.

ORDER

Based upon the above and foregoing, the Court ORDERS, DECLARES and DETERMINES that Act No. 406 of the 1967 Regular Session of the Legislature of Alabama, and Ordinance No. 1120 adopted by the Jefferson County Commission on September 29, 1987, are valid and subsisting laws and in full force and effect.

It is further ORDERED that the costs of Court be taxed against the plaintiffs, for the recovery of which let execution issue.

DONE this 11th day of December, 1987.

BRAXTON L. KITTRELL, JR.
Circuit Judge

* * * * * * *

Hoyt BEDINGFIELD, Jr., in his capacity as the acting director of finance of the City of Birmingham, et al.

v.

JEFFERSON COUNTY, et al.

87-316.
Supreme Court of Alabama.
May 20, 1988.

City Challenged constitutionality of county ordinance establishing occupational tax. The Circuit Court, Jefferson County, Braxton L. Kittrell, Jr., J., upheld ordinance, and appeal was taken. The Supreme Court, Beatty, J., held that: (1) statute authorized county to levy occupational tax; (2) statute was general, rather than local legislation; and (3) statute authorizing levy of tax provided for collection of such tax.

Affirmed.

BEATTY, Justice.

This is an appeal by Hoyt Beddingfield, Jr., as acting director of finance of the City of Birmingham, and the City of Birmingham from a judgment upholding a Jefferson County ordinance, specifically Ordinance No. 1120, establishing an occupational tax. We affirm.

The action was filed on October 19, 1987, and was consolidated for trial with the case of *Carolyn Phillips, et at. v. Jefferson County Commission.*

Ordinance No. 1120 levies a license or privilege tax on natural persons engaged in any vocation, occupation, calling, or profession who are not required by law to pay any license or privilege tax to the state or county. This tax was promulgated by Jefferson County under the authority of Act No. 406, approved September 7, 1967, *Acts of Alabama 1967,* at 21-23. Pertinent sections thereof are quoted below:

"AN ACT

"To authorize the governing body of any county of the State having a population of 500,000 or more, according to the last or any subsequent Federal census, to levy a business or privilege tax upon any business, vocation, occupation, calling or profession for which a license or privilege tax is not required for either the State of Alabama or the county by the laws of the State of Alabama, and to limit the amount of any such business or privilege tax.

"Be It Enacted by the Legislature of Alabama:

"Section 1. This Act shall apply to any county of the State of Alabama having a population of 500,000 or more, according to the last or any subsequent federal census, and to no other county.

". . . .

"Section 3. The purpose of this Act is to equalize the burden of taxation by authorizing the county to impose a license or privilege tax upon persons now engaging in certain businesses without paying any license tax thereon to either the state or county.

"Section 4. The governing body of the county is hereby authorized to levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the county by any of the following: Article 1, Chapter 20, Title 51; Sections 176, 177, 178, 180, 182, 183, 184, 186, 429, and 826 in Title 51 of the Code of Alabama of 1940 as amended.

"When a person is engaged in more than one business for one or more of which a license or privilege tax is required to be paid t the State or the county but for one or more of which no license or privilege tax is required to be paid to the State or county, the county governing body shall have the authority to levy a license or privilege tax upon that business, or those businesses, for engaging in which such person is not required to pay any license or privilege tax to the State or county.

"Section 5. The tax hereby levied shall be paid to that officer or employee of the county chargeable with the duty of collecting license or privilege taxes payable to the county.

"Section 6. No license or privilege tax levied by the governing body of the county on any person, for engaging in any business shall be at a rate which is in excess of the rate of license or privilege tax levied by the largest municipality of the county on the same or similar type of business activity."

Allegations of unconstitutionality made below were denied by the defendants. Following discovery, testimony taken in open court, and stipulation, the Jefferson Circuit Court upheld the ordinance, and this appeal followed. Because a number of issues are presented here, we shall treat them *seriatim.*

I.

Did Act No. 406 manifest a legislative intent to authorize Jefferson County to levy an occupational tax?

Plaintiffs' argument here is multifaceted. First, they contend that the stated purpose of the Act is to authorize a tax only upon "certain businesses," and not "occupations." Further, plaintiffs argue that § 6 of Act No. 406 does not permit a privilege tax "which is in excess of the rate of license or privilege tax levied by the largest municipality of the County on the same or similar type of business activity," meaning that Jefferson County could not implement the Act by levying a tax in excess of that which had been levied by Birmingham. Because Birmingham had no such privilege tax in 1967, plaintiffs argue, any county tax under Act No. 406 would offend the Act. Finally, according to plaintiffs, the county's own implementation of the Act when it was enacted in 1967, as only a licensing code authorizing licensing of certain businesses, gives weight to the limiting nature of Act No. 406.

We must respectfully reject these arguments. While we are mindful that taxing statutes are to be strictly construed, *State v. Seals Piano Co.,* 209 Ala. 93, 95 So. 451 (1923), it does not offend that principle to uphold this statute. Indeed, the express language of the Act authorizes the county "to levy a business or privilege tax upon any business, vocation, occupation, calling or profession." When the intention of the legislature is so apparent from the face of a statute that there can be no question as to its meaning, there is no room for construction.

American Institute of Psychotherapy v. Alabama Board of Examiners in Psychology, 410 So.2d 54 (Ala. 1982). Thus, § 4 is to be read as authorizing a privilege tax "upon any person for engaging in any business [or occupation]."

Municipal licensing authority has existed at least since the Code of 1907, see Code of 1975, § 11-51-90. Birmingham originally adopted its licensing code as early as 1916, and in 1967 it had an extensive catalog of business categories subject thereto. However, it was not until 1970 that Birmingham itself adopted Ordinance No. 70-76, providing for a license fee for occupations and professions. Given the fact that Birmingham had possessed the authority under state law to impose an occupational privilege tax since 1907, it is clear that by § 6 of Act No. 406 the legislature, cognizant of that power, decided to restrict the county's authority to a maximum as established by Birmingham's occupational privilege tax. It is a fundamental principle that the legislature, in enacting a statute, is presumed to have full knowledge and information on prior and existing law on the subject of the statute. *Ex parte Love* 513 So.2d 24 (Ala. 1987). Thus, we cannot agree with plaintiffs that Act. No. 406 required Jefferson County to implement its authority contemporaneously thereunder, or lose it altogether. The Act itself contains no such limiting language. True, Jefferson County did not implement the "occupational" aspect of the statute until 1987. Nevertheless, the authority to do so continued.[2]

Finally, we are not persuaded by plaintiffs' argument that, in construing Act No. 406, this Court should defer to the county's alleged contemporaneous interpretation

---

[2] By stipulation, it was established that, while Birmingham itself adopted its license code as early as 1916, and possessed an extensive license code in 1967, it did not establish its occupational tax until 1970.

of the Act. Because we do not find the Act doubtful in its meaning, we need not resort to an alleged contemporaneous interpretation by the county.

II.

Is Act No. 406 unconstitutional as violating limitations on local legislation as explained in *Peddycoart v. City of Birmingham*, 354 So.2d 808 (Ala. 1978)?

According to plaintiffs, Act No. 406 violates the mandate of *Peddycoart* in two respects: (1) the general laws of Alabama have preempted the field of license and privilege taxation to prevent reliance upon local legislation, and thus Act No. 406 violates Section 105 of the Constitution; and (2) the population classification of Act No. 406 (500,000 or more), which makes it a "bracket bill," lacks a reasonable relationship with the statute's purpose.

Commenting upon *Peddycoart* in *Freeman v. Purvis*, 400 So.2d 389 (Ala. 1981), this Court stated:

> "We must point out, however, that following the *Peddycoart* decision which was released on January 13, 1978, two amendments to the Alabama Constitution of 1901 were ratified by the people: Amendment No. 375, ratified on November 20, 1978, and Amendment No. 389, ratified on November 4, 1980. Because the latter Amendment is pertinent, we quote it here:
>
> > "Any statute that was otherwise valid and constitutional that was enacted before January 13, 1978, by the legislature of this state and was a general act of local application on a population basis, that applied only to a certain county or counties or a municipality or municipalities of this state, shall not be declared invalid or unconstitutional by any court of this state because it was not properly advertised in compliance with section 106 of this Constitution.

> > "'All such population based acts shall forever apply only to the county or counties or municipality or municipalities to which they applied on January 13, 1978, and no other, despite changes in population.'
> >
> > ". . . .
> >
> > "The effect of this Amendment was to validate all 'bracket bills' enacted without advertising before January 13, 1978, the date of the *Peddycoart* decision, and which were not otherwise unconstitutional . . . ."

Act No. 406 was approved in 1967, well before the date of the *Peddycoart* decision of January 13, 1978, and, as a general law of local application, was validated by Amendment 389 even though it was not advertised under Section 106 of the Constitution of 1901.

Even under pre-*Peddycoart* standards, Act No. 406 must survive a constitutional attack based on a supposed lack of relationship between its purpose and the expressed population classification. As observed in *Dearborn v. Johnson*, 234 Ala. 84, 173 So. 864 (1937), on that subject, much is left to legislative discretion in fixing that classification and in recognizing that purpose. In *Couch v. Rodgers*, 253 Ala. 533, 45 So.2d 699 (1950), this Court reviewed a number of its decisions that had upheld "bracket bills" of substantial minimum, but no maximum, population classifications:

> "We have numerous decisions which give illustration to the principle. We will not undertake to analyze them all, but only such as seem to shed light upon the instant suit. In the case of *Wages v. State*, 225 Ala. 2, 141 So. 707, 708 [1932], this Court was dealing with an act similar to the one here involved. By its terms it had application to counties having a population of three hundred thousand or more according to the last or any subsequent federal census.

The Court there undertook to apply the principle which we have stated above. The act was held to be general, although it then applied only to Jefferson County. We quote from that opinion as follows: 'The wisdom of the law and the necessity for its enactment and the classification adopted were addressed to the lawmaking body. It may be well said, this body understood and appreciated the necessity of furnishing protection to the people in the matter legislated upon in the act, in the larger and more populous counties of the state, which was not necessary or practicable in the smaller counties.'

"We have numerous cases which bring out that application of the principle wherein it was observed that counties of large population may reasonably be supposed to be differently served in many respects than counties of smaller population and there is sometimes drawn a distinction between a classification based upon a minimum population and a classification based upon a population with both a minimum and a maximum limit. The case of *State ex rel. Shirley v. Lutz*, 226 Ala. 497, 147 So. 429 [1933], brings out that distinction. That case was dealing with an act regulating the business of plumbing in counties having a population of 100,000 or more according to the last or any subsequent federal census. The Court emphasized the different principles applicable when there is only a minimum but not a maximum number. When there is only a minimum, the Court thought a more liberal application of the principle should be made.

". . . .

"*In the Opinion of the Justices*, 249 Ala. 511, 31 So.2d 721, we were responding to a legislative inquiry as to a proposed act applicable to counties of 400,000 population or more according to the last or any subsequent federal census, which would require the payment to such counties of a license tax of one cent on each gallon of gasoline. We thought there was a reasonable relation of the subject matter of the Act to counties of such population because we thought that in large counties the load of traffic on the highways by reason of such population justified the legislature in providing additional income in order to take care of its effect."

It is clear from the terms of Act No. 406 that its purpose was to provide more populous counties with a source of revenue by authorizing them to impose a privilege or license tax. The record establishes, if common sense does not, that needs and demands for services made upon county governments keep pace with urbanization and increases in population, necessitating new opportunities for revenue. It follows that populous counties experience greater demands for costly services than those sparsely populated. In this case, therefore, the requisite relationship was established. *Peddycoart, supra.*

Is Act No. 406 unconstitutional under § 105, Constitution of 1901?

Plaintiffs maintain that Act No. 406 is constitutional under Section 105, Constitutional of 1901. The pertinent part of that section states that "[n]o special, private, or local law . . . shall be enacted in any case which is provided for by a general law." Plaintiffs reason that Act No. 406 is infirm under that provision because of the prior enactment of Article I, Chapter 20, Title 51, Code of 1940, now Article II, Chapter 12, Title 40, Code of 1975, which provides:

"Every person, firm, company, corporation or association, receiver or trustee, but not a governmental subdivision, engaged in any business, vocation, occupation, calling or profession herein enumerated or who shall exercise any privilege hereinafter described for which a license or privilege tax is re-

> quired shall first procure a state license, and a county license when so required, and shall pay for the same or shall pay for the exercise of such privilege the amounts hereinafter provided, and comply with all other provisions of this title."

Section 40-12-40, Code of 1975.

Act No. 406, as we have stated, is a general law, not a local law; thus Section 105 is inapplicable.

III.

Finally, plaintiffs contend that Act No. 406 fails for want of an express provision therein for the collection of an occupational tax. Plaintiffs argue further that a reading of Act No. 406 to so provide would violate Section 104(15) of the Constitution of 1901, which prohibits the enactment of a local law "[r]egulating either the assessment or collection of taxes."

For the reasons previously discussed, Act No. 406 is a general, not a local, law; hence, this provision, Section 104(15), is inapplicable. And, as the trial court found:

> "The Courts have long held that there is a distinction between the terms 'assessment' and 'levy' and held that 'assessment,' as used in Subdivision (15), relates to property taxes rather than privilege taxes. *Opinion of the Justices,* 266 Ala. 363, 369, 96 So.2d 634 (1957) (quoting *Standard Oil Co. v. Limestone County,* 220 Ala. 231, 234-235, 124 So. 523 (1929)."

Moreover, the grant of authority to "levy a license or privilege tax upon any person" in § 4 of Act No. 406 was in itself authority to collect such a tax. Cf., *Syracuse Trust Co. v. Board of Supervisors,* 13 N.Y.S.2d 390 (Sup.Ct.), *affirmed,* 258 A.D. 17, 15 N.Y.S.2d 920 (1939); to "levy" is to "collect" a tax. *Black's Law Dictionary* (5th ed. 1979) at 816.

Let the judgment be affirmed.

AFFIRMED.

TORBERT, C.J., and MADDOX, JONES, ALMON, SHORES and ADAMS, JJ., concur.

* * * * * * *

MOTION TO STRIKE

Filed November 2, 1992

[Caption Omitted in Printing]

COME NOW the Defendants, Jefferson County, Alabama and Randy Godeke, and hereby move this Court to strike the affidavits of Braxton Kittrell, William Acker, Sara Tackett and Fannie Hill which were submitted by Plaintiffs in response to the County's MOTION FOR SUMMARY JUDGMENT. In further support of this motion, Defendants state as follows:

1. AFFIDAVIT OF BRAXTON KITTRELL

The contents of Judge Kittrell's affidavit are immaterial to the issue of res judicata. The test is *not* whether the federal constitutional claims *were* adjudicated by Judge Kittrell, rather the test is whether the federal constitutional claims **could have been** adjudicated. *Baker v. City of Guntersville,* 600 So.2d 280 (Ala. Civ. App. 1992); *Dairyland Insurance Company v. Jackson,* 566 So.2d 723 (Ala. 1990); *NAACP v. Hunt,* 891 F.2d 1555 (11th Cir. 1990). As discussed in the County's MOTION FOR SUMMARY JUDGMENT, res judicata bars not only the precise legal theories adjudicated in the prior case, but *all legal theories and claims arising out of the same nucleus of operative fact.* The federal constitutional claims in the instant suit clearly arise out of the same nucleus of operative fact as

those presented in *Bedingfield*. Thus, said claims are barred regardless of whether they were properly presented, briefed and argued by the *Bedingfield* plaintiffs *or* adjudicated by Judge Kittrell.

Moreover, the law is well settled that a trial judge's failure to rule on a claim operates as a *denial* of that claim. *McClure v. Moore,* 565 So.2d 8 (Ala. 1990). The *Bedingfield* complaints and amended complaints (collectively attached to the MOTION FOR SUMMARY JUDGMENT as Exhibit B) contain numerous allegations pursuant to the United States Constitution, federal civil rights laws and state law. Thus, by operation of law, Judge Kittrell's failure to rule on the federal claims amounts to a denial of those claims.

Further, regardless of Judge Kittrell's order, the Alabama Supreme Court dealt squarely with the Federal Equal Protection argument as it was framed in *Bedingfield's* appellate brief. In that brief (attached to the County's MOTION FOR SUMMARY JUDGMENT as Exhibit D1-6), *Bedingfield's* attorneys denominated their equal protection argument as issue II-B:

> "[d]oes Act No. 406 and the occupational tax adopted by Jefferson County comply with principles of equal protection?"

The corresponding Argument portion of the *Bedingfield* brief (attached to the County's MOTION FOR SUMMARY JUDGMENT as Exhibit D4-5) asserted that Act No. 406 violated the Equal Protection clause in that there was no reasonable relationship between the statute's purpose and the population classification. The *Bedingfield* brief took its argument from *Peddycoart v. City of Birmingham,* 354 So.2d 808 (Ala. 1979) (attached hereto), in which the Supreme Court determined that a 1915 population classification act which conferred immunity upon all cities with a population of more than 100,000 violated

the *Equal Protection clause of the U.S. Constitution* because the statute's purpose was *not* reasonably related to the population classification therein.

At page 1272 of the *Bedingfield* opinion, Justice Beatty (also the author of *Peddycoart*) reprinted the issue as set forth in *Bedingfield's* brief and denominated it as Issue II-(2). He then devoted nearly two pages of the opinion to a discussion of *Peddycoart* and concluded at page 1274 that the purpose of Act No. 406 *was reasonably related* to the population classification:

> "It is clear from the terms of Act No. 406 that its purpose was to provide more populous counties with a source of revenue by authorizing them to impose a privilege or license tax. The record establishes, if common sense does not, that needs and demands for services made upon county government keep pace with urbanization and increases in population, necessitating new opportunities for revenue. It follows that populous counties experience greater demands for costly services than those sparsely populated. In this case, therefore, the requisite relationship was established. *Peddycoart, supra.*"

527 So.2d at 1274.

Thus, regardless of Judge Kittrell's order, it is clear that the Federal Constitutional Challenges to the occupational tax were **HEARD** and **REJECTED** by the Alabama Supreme Court in the *Bedingfield* case. For these reasons, Judge Kittrell's affidavit *adds nothing* to the res judicata analysis and is due to be stricken as immaterial.

2. AFFIDAVIT OF WILLIAM ACKER.

The affidavit of William Acker also adds nothing to the res judicata analysis. The affidavit merely asserts that Judge Acker intends to force the County to sue him to collect the tax. It is more significant that William Acker

and *all* other active Federal Judges of the Northern District of Alabama and *all* of the other federal employees have paid and continue to pay *without challenge* the City of Birmingham Occupational Tax (measured at 1% of gross receipts) since its enactment in 1970!!!

3. AFFIDAVIT OF SARA TACKETT.

The affidavit of Ms. Tackett, office manager for Plaintiffs' lawyers, is due to be stricken for several reasons. First, it adds absolutely nothing to the res judicata analysis. Second, it contains *untrue* assertions to the effect that Jason Richards, a courier, pays in excess of $300 in County Occupational Tax on a $6,000 annual salary while, at the same time, the attorneys Baxley and Dillard pay no occupational tax on salaries of hundreds of thousands of dollars. Ms. Tackett's statement are misleading, her arithmetic is erroneous and she fails to disclose that the lawyers in her firm are paying thousands of dollars each year in occupational taxes to the City of Birmingham and to the State of Alabama.

Act No. 406 states, on its face, that its purpose is to *"equalize the burden of taxation"* by imposing a County Occupational Tax on individuals who work in the County and who do not already pay occupational tax to the State. Section 3, Act 406 (attached to County's MOTION FOR SUMMARY JUDGMENT as Exhibit F). Thus, individuals (such as practicing attorneys Bill Baxley and Joel Dillard) who are required by State law to pay the State Occupational License are exempt from the County tax. Section 4, Act No. 406. Further, Act No. 406 expressly recognizes that many of the prospective taxpayers would also be required to pay the Birmingham Occupational Tax. Therefore, Act No. 406 prohibits the rate of the County tax from exceeding the occupational tax rate of Birmingham. Section 6, Act 406.

As set forth in the attached affidavit of Randy Godeke, Director of Revenue, Jefferson County, Alabama, the *true* calculation of occupational taxes for Jason Richards and Bill Baxley on income earned in the City of Birmingham are as follows:

JASON RICHARDS — 1991 EARNINGS —	$	6,269.00
A. State Occupational —		-0-
B. County Occupational (.005)	$	31.35
C. City Occupational (.01) —	$	62.69
TOTAL	$	94.04
BILL BAXLEY — 1991 EARNINGS —	$	388,371.00
A. State Occupational	$	151.25
B. County Occupational		-0-
C. City Occupational (.01)	$	3,883.00
TOTAL	$	4,034.25

Thus, the statement and calculations contained in the Tackett affidavit are complete fabrication. As they serve no purpose, other than to inflame and mislead the reader, they are due to be stricken.

4. AFFIDAVIT OF FANNIE HILL.

The County occupational tax (and the Birmingham occupational tax) exempts domestic servants. The term "domestic servant" is defined by Black's Law Dictionary as follows:

> "A domestic, or, in full, domestic servant, is a servant who resides in the same house with the master. The term does not extend to workmen or laborers employed out of doors."

Id.

In her affidavit, Ms. Hill erroneously describes herself as a "domestic servant in commercial settings". There is no such thing. Her own affidavit establishes that she is a

full-time professional janitor employed by a commercial contract janitorial company, *not* a domestic servant. Interestingly, she fails to state that she continues to pay, without challenge, the Birmingham occupational tax.

Ms. Hill's affidavit adds nothing to the res judicata analysis and is, therefore, due to be sticken.

CONCLUSION

In its MOTION FOR SUMMARY JUDGMENT, the County has demonstrated that the doctrine of res judicata bars *all* of the claims raised by the Plaintiffs in the instant suit. Specifically, the County has demonstrated that:

1. The *Bedingfield* opinion is a prior judgment on the merits; and

2. The Alabama Supreme Court is a court of competent jurisdiction; and

3. Substantial identity of parties exists between current and former Plaintiffs in that, under the test set forth by the Alabama Supreme Court, former and current Plaintiffs are in privity with one another because their interests, rights, motivations and goals are *identical* and because current Plaintiffs would have been protected from payment of the tax had the *Bedingfield* court invalidated the tax; and,

4. The causes of action in the instant suit are substantially the same as those which were or could have been presented in *Bedingfield* because they all clearly arise out of the same nucleus of operative fact. That is, the facts have not changed; the evidence has not changed; the remedies have not changed; and the tax itself has not changed.

The affidavits of Braxton Kittrell, William Acker, Sara Tackett, and Fannie Hill are wholly immaterial to the issue of res judicata and are, therefore, due to be

stricken. Further, this suit is clearly barred by the doctrine of res judicata and the County should not be put to the burden and expense of having to relitigate the constitutionality of its occupational tax. The County is due the entry of summary judgment in its favor without further delay.

[Subscription of Attorney and Certificate of Service Omitted in Printing]

AFFIDAVIT

Before me, the undersigned Notary Public in and for said County and State, personally appeared Randy Godeke, who being known to me and being first duly sworn, states on oath as follows:

> My name is Randy Godeke, I am the Director of Revenue for Jefferson County, Alabama. I am over the age of twenty-one (21) and have personal knowledge of the facts set forth herein.
>
> I have reviewed the affidavit of Sara Tackett which was provided to me by the Jefferson County's Attorney's office. In her affidavit, Ms. Tackett incorrectly states the amount of County Occupational Tax owed by Jason Richards. Further, Ms. Tackett fails to state the other occupational taxes which would be owed by both Mr. Richards and the lawyers in their firm.
>
> Assuming that Jason Richards earned $6,269.00 in 1991 in Birmingham, Alabama, he would owe occupational taxes as follows:

A.	State Occupational —	-0-
B.	County Occupational (.005) —	$31.35
C.	City Occupational (.01) —	$62.69
	TOTAL	$94.04

Assuming that Mr. Baxley earned $388,371.00 in 1991 in Birmingham, Alabama, he would owe occupational taxes as follows:

A. State Occupational	$ 151.25
B. County Occupational	-0-
C. City Occupational (.01)	$3,883.00
TOTAL	$4,034.25

/s/ Randy Godeke
Randy Godeke

[Jurat Omitted in Printing]

* * * * * * *

NOTICE OF FILING AFFIDAVITS IN SUPPORT OF CONDITIONAL CERTIFICATION OF CLASS AND SUB-CLASSES, AND IN OPPOSITION TO SUMMARY JUDGMENT

Filed March 2, 1993

[Caption Omitted in Printing]

Come plaintiffs and file with the Court certified copies of an Order, Defendant's First Set of Interrogatories to Plaintiff, and the affidavit of Defendant Randy Godeke in response thereto from a parallel pending federal action, Jefferson County v. Acker, CV 93-U-0069-S.

[Subscription of Attorney and Certificate of Service Omitted in Printing]

* * * * * * *

ORDER

Entered February 25, 1993

[Caption Omitted in Printing]

The above-captioned cases were filed in the District Court of Jefferson County, Alabama, seeking to recover taxes allegedly due by defendants pursuant to Jefferson County Ordinance 1120, and each was removed to this Court. They are now before the Court on motions to remand and to consolidate.

The above cases were removed to this Court pursuant to 28 U.S.C. § 1442 (a)(1), (3) which provides in pertinent part:

> (a) a civil action . . . commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States . . . for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue . . .
>
> (3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties.

Petitioners, Unites States district judges, are officers of the United States and of the courts of the United States. Jefferson County claims that, pursuant to ordinance 1120, each defendant owes Jefferson County in taxes a percentage of each defendant's gross salary from the United States for the applicable period.

Jefferson County's ordinance No. 1120, upon which the original complaint are based, provides in part:

> It shall be unlawfull for any person to engage in or follow any vocation, occupation, calling or profession . . . without paying license fees for

the privilege of engaging in a following such vocations, occupation, calling or profession . . .

The ordinance therefore clearly implicates defendants' acts under color of office as United States district judges with respect to both civil and criminal matters — indeed every judicial act performed by them. Since the removed actions involve claimed delinquent taxes, the ordinance purports to say that such acts were unlawfully performed by defendants.

Claimant Jefferson County urges that the cases be remanded on the ground that this Court has no subject matter jurisdiction, citing the Tax Injunction Act, 28 U.S.C. § 1341 and the Buck Act, 4 U.S.C. § 106(a). But this Court has, pursuant to 28 U.S.C. § 1442, at least the same jurisdiction as that possessed by the District Court of Jefferson County. *Pennsylvania Turnpike Commission v. McGinnes*, 179 F. Supp. 578, 580 (D.C. Pa, 1959), affirmed 278 F. 2d 330, *cert. den*, 364 U.S. 820. The defendants have sought no relief other than that which would appear to be within the jurisdiction of the District Court of Jefferson County Alabama. There are numerous cases to the effect that 28 U.S.C. § 1442 shall be given a liberal construction. The motions to remand are therefore DENIED.

The motion to consolidate the two above captioned cases is unopposed, the cases present identical questions of fact and law, and this Court finds consolidation appropriate, and grants the motion to consolidate.

SO ORDERED, this 23 day of February, 1993.

CHARLES A. MOYE, JR.
UNITED STATES DISTRICT JUDGE

****

DEFENDANT'S FIRST SET OF INTERROGATORIES TO PLAINTIFF

[Caption Omitted in Printing]

Pursuant to Rule 26, F.R.Civ.P., William M. Acker, Jr., defendant in the above-entitled cause, propounds the following interrogatories to plaintiff, Jefferson County, a political subdivision of the State of Alabama.

1. Does Jefferson County's Ordinance No. 1120, as predicted in its preamble, "establish a license or privilege tax" on persons engaged in Jefferson County in certain vocations, occupations, callings and professions, to the exclusion of other persons engaged in Jefferson County in other vocations, occupations, callings and professions?

2. Inasmuch as Ordinance No. 1120 uses the phrases "occupational tax", "privilege tax" and "license fee" interchangeably, are the phrases intended as synonyms?

3. What are the differences, if any, between a "license fee," an "occupational tax" and a "privilege tax"?

4. Do persons engaged in the following businesses, vocations, occupations, callings and professions enjoy an exemption from the obligation to "pay a license fee under this ordinance" as provided in the definition of "license" contained in Section 1(G) of Ordinance No. 1120:

(a) Lawyers in private practice.

(b) Lawyers who work as salaried employees for public entities or business entities but who hold licenses to practice law in the State of Alabama.

(c) Stockbrokers even though affiliated with a brokerage firm.

(d) Physicians in private practice.

(e) Physicians who work as salaried employees for public entities or business entities but who hold Alabama licenses to practice medicine.

(f) Veterinarians.

(g) Pharmacists.

(h) Chiropractors.

(i) Naturopaths.

(j) Podiatrists.

(k) Osteopaths.

(l) Registered nurses.

(m) Licensed practical nurses.

(n) Engineers in private practice.

(o) Engineers who work as salaried employees for public entities or business entities but who hold Alabama engineering licenses.

(p) Architects.

(q) Real estate agents.

(r) Real estate brokers.

(s) Insurance agents.

(t) Insurance agents who work as salaried employees for public entities or business entities but who hold Alabama real estate licenses.

(u) Insurance brokers.

5. List all occupations not named in response to No. 4 and which require a license from the State of Alabama and are therefore excluded from the requirements of Ordinance No. 1120.

6. List all occupations not named in response to No. 4 and which require a license from Jefferson County and therefore are excluded from the requirements of Ordinance No. 1120.

7. Have Alabama's two United States senators, both of whom have offices located in Jefferson County, ever paid a license fee or any portion of their legislative salaries to Jefferson County pursuant to Ordinance No. 1120?

8. Have either the Jefferson County Attorney or any member(s) of his staff of attorneys ever paid a license fee

or any portion of their salaries to Jefferson County pursuant to Ordinance No. 1120?

9. Has any United States Tax Court judge, who sits in Jefferson County from time to time, ever paid any occupational tax to Jefferson County pursuant to Ordinance No. 1120?

10. Has any United States Courts of Appeals judge (in particular Hon. Robert S. Vance), who sits in Jefferson County from time to time, ever paid any occupational tax to Jefferson County pursuant to Ordinance No. 1120?

11. Have any entertainers or artists who have performed in one-time concerts or events in Jefferson County ever paid the license fee or any portion thereof pursuant to Ordinance No. 1120?

12. Have all members of the Armed Forces of the United States who reside in and perform services in Jefferson County paid the license fee or any portion thereof pursuant to Ordinance No. 1120?

13. Will the federal judge who is specially appointed or designated to sit in this case because of the recusal of all regular judges of this court be subject to Jefferson County's so-called occupational tax upon a portion of his or her income earned from judicial services performed in this case while in Jefferson County? (This defendant expressly waives the venue or territorial jurisdictional requirement that this case proceed in the Southern Division of this court in order to obviate any problems inherent in this question.)

14. Since the enactment of Ordinance No. 1120, has Jefferson County made any demand or demands on persons not residents of Jefferson County, or on their employers who are located in Jefferson County, for payment of the license fee or occupational tax pursuant to Ordinance No. 1120?

15. If the answer to No. 14 is affirmative, name all such persons and employers, giving their residence and business addresses, when and how each demand was made, whether or not there was compliance after demand, and whether or not a suit has been filed or an arrest made in the event of non-compliance.

16. After January 1, 1988, how many people have been audited by Jefferson County on a suspicion or belief by Jefferson County that a higher percentage of their annual income was earned in Jefferson County than was claimed by the licensee?

17. Is it routine that a licensee under Ordinance No. 1120 pay one-half of one percent of all of his or her income to Jefferson County no matter what percentage of his or her income was earned in Jefferson County and thereafter to file a verified claim for a refund, or is the licensee routinely allowed to estimate in advance the percentage of his or her income expected to be earned in Jefferson County and to pay only the percentage of a full license fee reflected by that estimate, subject to later amendment and audit?

18. State the words of the oath or oaths required of licensees and of employers pursuant to Ordinance No. 1120?

19. Are the penalties for false swearing under the required oath the same penalties as for perjury under the criminal statutes of Alabama?

20. Does Ordinance No. 1120 constitute an "income tax" in any sense?

21. If the answer to No. 20 above is affirmative, explain in detail how and under what circumstances Ordinance No. 1120 constitutes an "income tax."

22. Has Jefferson County ever filed a claim in the Federal Claims Court, or any other court, against the United States or against any agency of the United States as an

employer of a person or persons subject to withholding under Ordinance No. 1120 as a result of the employer's not withholding payment from its employee or employees as required by Ordinance No. 1120?

23. If the answer to No. 22 is negative, why has Jefferson County never filed such a claim or suit?

24. State the rationale, if there is a rationale, for the exemption of domestic servants, no matter what the amount of their income earned in Jefferson County, from the license fee in Ordinance No. 1120.

25. Was a reason for calling Ordinance No. 1120 an "occupational tax" or a "privilege tax" or a "license fee" the prohibition of Alabama law against Jefferson County's levying an income tax?

26. If the answer to No. 25 is negative, state the rationale for carefully never referring to tax based exclusively on a percent of income as an "income tax"?

27. Does Jefferson County concede that, with proper legislative authority from the Alabama Legislature, all 31 counties in the Northern District of Alabama could adopt ordinances similar to Ordinance No. 1120, thus obligating a federal judge who sits in all 31 counties to pay a portion of his or her income to each and all of the 31 counties?

28. If the answer to No. 27 is negative, why would it not be possible?

29. Why is Jefferson County's so-called "occupational tax" or "privilege tax" or "license fee" markedly different from the similar tax levied by the City of Birmingham, particularly in that the City's ordinance contains no exceptions for persons holding other licenses and treats all taxpayers alike?

30. Does Jefferson County consider it fair and equitable and equal treatment for a lawyer who practices law only in Jefferson County and who earns one million dol-

lars a year to be entitled to perform such professional services in Jefferson County for a license fee of $200.00 per year paid to the State (only a portion of which goes to Jefferson County), while a federal judge who earns approximately $133,000 per year and who performs services in 31 counties, must, in order lawfully to perform his duties, pay a license fee of approximately $665.00 per year to Jefferson County alone for the privilege of having his main office in Jefferson County (one of the 31 counties he or she serves), a location chosen not by him or her but by the United States?

31. Now that Section 104 of the Federal Courts Administration Act of 1992 (Public Law 102-572), which amended 28 U.S.C. § 291(c), allows federal district judges to be reassigned outside their districts, if the Northern District of Alabama successfully requests the assignment here of a district judge from another district for conducting a long trial or trials because of an unmanageable case load in the Northern District of Alabama, will he or she be deemed subject to Ordinance No. 1120 while situated temporarily in Jefferson County?

32. State all reasons why Jefferson County attempted during the legislative year 1991, by having H.R. 527 introduced, to amend Act No. 406, adopted by the 1967 Alabama Legislature and upon which Ordinance No. 1120 is based?

33. Was one reason Jefferson County proposed an amendment to Act No. 406 its doubts or worries about the constitutionality or legality of Ordinance No. 1120?

34. Explain precisely how the fee, penalties and attorney's fees alleged in the instant complaint were calculated.

35. How many employees of the United States or agencies of the United States does Jefferson County claim to have been delinquent or not properly licensed under Ordinance No. 1120 prior to the first collection suit's having been filed by Jefferson County?

36. Does a United States district judge who has an office and courtroom in the same federal courthouse in which this defendant has his office and courtroom and who has periodic responsibility for trying cases in Jefferson County, but whose permanent assignment and chambers within the Northern District of Alabama is in Madison County, Alabama, owe the occupational license or any portion thereof to Jefferson County?

37. Would an honestly held belief that Ordinance No. 1120 is unconstitutional or illegal in its application to a particular individual constitute a sufficient reason for Jefferson County's waiving penalty and/or interest under the provision of the ordinance which allows such a waiver if "a good and sufficient reason is shown for the failure to pay the tax within the time required"?

38. If the answer to No. 37 is negative, list all "good and sufficient reasons" for such a waiver of penalty and/or interest, that is unless the Director of Revenue has total discretion in the matter.

39. What Alabama statute of limitations bars a claim for an unpaid license fee under Ordinance No. 1120?

40. What is the maximum punishment that can be imposed upon a person convicted under Ordinance No. 1120 (refer in particular to the statutory basis)?

41. What is the statute of limitations for a criminal prosecution for an alleged violation of Ordinance No. 1120 (refer in particular to the statutory basis)?

WILLIAM M. ACKER, JR.
Defendant
Pro se
481 U. S. Courthouse

[Certificate of Service Omitted in Printing]

* * * * * * *

ANSWERS TO INTERROGATORIES

[Caption Omitted in Printing]

1. Jefferson County Ordinance 1120 levies a license or privilege tax upon persons engaged in any vocation, occupation, calling or profession in Jefferson County who are not required by law to pay license or privilege tax to the State for the particular business. The Ordinance is authorized by Alabama Act No. 406, Legislature of Alabama 1967 (herein "Act No. 406") which provides in part:

> Section 3. The purpose of this Act is to equalize the burden of taxation by authorizing the county to impose a license or privilege tax upon persons now engaging in certain businesses without paying any license tax thereon to either the state or county.

2. The terms appear to be synonymous as used in the Ordinance and the Act.

3. None, as those terms are used in the Ordinance and the Act.

4. Section 4 of Act No. 406 authorizes the governing body of the County "to levy a license or privilege tax upon any person for engaging in any business for which he is not required by law to pay any license or privilege tax to either the State of Alabama or the County" by the State License Code. The State License Code is chiefly set out at Chapter 12, Title 40, Code of Alabama (1975). Accordingly, for each occupation questioned in Interrogatory 4 (a) - (u) reference must be made to the State License Code. If the subject occupation is included therein, and the individual is "required by law" to procure the State License Code license for the individuals' specific "business" then that individuals' specific "business" is exempted from the license or privilege tax established by Act No. 406. Following herewith are citations to the State License Code which appear to coincide with the occupations which Interrogatory 4 identifies. Each individual's business must be examined in light of the express provisions of the State License Code to determine if it is covered thereby. (The mere fact that an individual purchases a State license does not provide an automatic exemption from the County tax.)

a. See § 40-12-49.

b. Depends upon whether lawyer is required to purchase State license in accordance with § 40-12-49.

c. See § 40-12-162.

d. See § 40-12-126.

e. Depends upon whether physician is required to purchase State license in accordance with § 40-12-126.

f. See § 40-12-178.

g. No license required by Title 40. However, pharmacists must purchase a County license. See § 34, Ordinance 1172.

h. See § 40-12-136.

i. See § 40-12-155.

j. See § 40-12-126.

k. See § 40-12-136.

l. No license required by Title 40.

m. No license required by Title 40.

n. See § 40-12-99.

o. Depends on whether the engineer is required to purchase State license in accordance with § 40-12-99.

p. See § 40-12-48.

q. See § 40-12-149.

r. No license required by Title 40. However, real estate salesmen must purchase County license. See § 89, Ordinance 1172.

s. No license required by Title 40. However, insurance agents must purchase County license. See § 90, Ordinance 1172.

t. I do not understand this question.

u. No license required by Title 40. However, insurance agents must purchase County license. See § 90, Ordinance 1172.

5. Objection. Plaintiff objects to listing every conceivable occupation. The information sought by this Interrogatory is equally available to the Defendant by reference to Act No. 406 and the State License Code.

6. Objection. Plaintiff objects to listing every conceivable occupation. The information sought by this Interrogatory is equally available to the Defendant by reference to Act No. 406, the License Code of Jefferson County (Ordinance No. 1172) and the State License Code.

7. The individuals who actually work in the offices of the United State Senators located in Jefferson County are subject to and pay the Jefferson County Occupational Tax on the portion of their earnings reported to be earned in Jefferson County. The Senators have not reported any earnings in Jefferson County.

8. The Jefferson County Staff Attorneys are required by State law to pay their license or privilege tax to the State. Accordingly, Act No. 406 does not authorize the County to tax their earnings. However, they are subject to the City of Birmingham Occupational Tax of 1 percent of their earnings.

9. I do not know any such judges. However, any such judges would be subject to the Jefferson County Occupational Tax on the portion of their earnings earned in Jefferson County (and the Birmingham Occupational Tax on the portion of their earnings earned in Birmingham).

10. I do not know any such judges. However, any such judges would be subject to the Jefferson County Occupational Tax on the portion of their earnings earned in Jefferson County (and the Birmingham Occupational Tax on the portion of their earnings earned in Birmingham). A dialogue was in process with Judge Robert Vance concerning the tax at the time of his death.

11. These individuals are required by State law to pay license or privilege tax to the State and are, therefore, exempt from the County occupational tax.

12. Members of the armed forces of the United States are subject to Jefferson County Occupational Tax on the portion of their earnings earned in Jefferson County.

13. It is my understanding that the Federal Judge assigned to this case is in senior status. If that is correct, he would not owe occupational tax to Jefferson County.

14. Yes.

15. Objection. Jefferson County has filed approximately 4,400 civil lawsuits against delinquent occupational taxpayers. The information concerning these suits is equally available to Defendant by inspection of the District Court records of Jefferson County, Alabama. Further, some of the information requested by Interrogatory 15 may be confidential pursuant to Section 9, Ordinance 1120. No one has been arrested.

16. In excess of 15,000 individual tax accounts have been examined to date to determine whether the proper amount of occupational tax has been paid.

17. The taxpayers who earn *part* of their wages in Jefferson County, Alabama, have the option of paying the tax on their full wages and later seeking the appropriate refund or, paying tax on the estimated amount of income they earn in Jefferson County, Alabama. The Department of Revenue has adopted a procedure to obtain a written estimate from the taxpayer.

18. No oaths are required of Jefferson County occupational taxpayers.

19. There are no required oaths.

20 - 21. Ordinance 1120 is not an "income tax" under Alabama law. However, with regard to federal employees, the Buck Act, 4 U.S.C. § 110(c) defines "income tax" as any tax levied on or measured by net income, gross income or gross receipts. The Buck Act makes all such state and local taxes applicable to federal employees.

22 - 23. Jefferson County had made efforts to obtain the voluntary cooperation of several agencies of the United States to implement the withholding of the Jefferson County Occupational Tax. Only two United States agencies have failed to initiate withholding at this time. As time and resources permit, other efforts will be pursued.

24. I do not know what was in the minds of the County Commissioners in 1987 when the Ordinance was adopted concerning exempting "domestic employees employed in private homes". However, the County Occupational Ordinance is very close to the City of Birmingham Occupational Ordinance which had been in place for 17 years before the County Ordinance was adopted and which also exempted such domestic servants employed in private homes. Further, it is apparent that performing domestic services in private homes does not carry the usual commercial concepts applicable to commercial suppliers of goods and services.

25. The terms identified at interrogatory no. 25 are used in accordance with the enabling legislation, Act No. 406 (1967).

26. See answer 25 above.

27 - 28. Jefferson County acknowledges that the State Legislature has the power to impose revenue taxes upon individuals with earnings from services provided within

the State. Further, that the State legislature has the power to delegate authority to counties and to municipalities to impose revenue taxes on the earnings of individuals performing services within those respective jurisdictions. Businesses routinely pay such revenue taxes to multiple taxing jurisdictions in which they conduct business. All municipalities in Alabama are already authorized to impose such business revenue taxes on earnings occurring within their jurisdictions.

29. It appears that in 1970 the City of Birmingham exercised its authority in full (except as to domestic servants employed in the home) as delegated to it by the Alabama Legislature by imposing its occupational tax on all occupations. It appears that Jefferson County exercised its authority in full (except as to domestic servants employed in the home) as delegated to it by the Alabama Legislature by imposing its occupational tax on all occupations that are not included in the State License Code. It also appears that the Alabama Legislature elected to subordinate the taxing authority which it delegated to Jefferson County to its own exercise of taxing authority through the State License Code.

30. Object. This interrogatory is argumentative. Nevertheless, it is noted that the argument is specious and implausible as demonstrated by substituting other taxing authorities. That is, does the Defendant likewise refuse to pay State of Alabama income tax and the City of Birmingham occupational tax because other federal judges located in states and municipalities without income tax and without privilege taxes do not have to pay similar taxes? The Defendant's argument is no different than an argument that might be raised by any employee of an employer (other than the United States) which directs an employee to work within an assigned territory. Probably very few such employee tax payers have the choice of which jurisdiction they will perform their services in.

31. Alabama income tax and municipal and county occupational taxes are imposed on earnings earned within the respective jurisdiction. The United States Congress is fully aware of the authority of state and municipal and county jurisdictions to impose revenue taxes on the earnings of members of the federal judiciary which occur within the jurisdictions. The United States Congress expressly declared in "The Buck Act" that such earnings are subject to such state and local revenue taxes and further are subject to withholding by the United States and its agencies. Neither the United States Congress nor the Alabama Legislature made any exception from their acts for members of the federal judiciary or other federal employees by reason of being "situated temporarily" within any such jurisdiction.

32. The bills referred to Interrogatory 32 would broaden the tax base and increase revenues for the operation of County government.

33. No. The constitutionality of Ordinance 1120 and Act 406 have already been upheld by the Alabama Supreme Court. See *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988).

34. The base tax is equal to one-half of one percent (.005%) of gross wages earned in Jefferson County, Alabama. The interest and penalties are imposed by Section 10, Ordinance 1120. Pursuant to Section 10, interest on delinquent taxes accrues at the rate of 12 percent per year. Pursuant to Section 10, delinquent taxes are subject to a 10 percent penalty.

35. The County has filed approximately 2,800 collection suits against employees of the United States, its agencies and instrumentalities.

36. Yes, but only upon that portion of gross wages earned in Jefferson County, Alabama. Further, if a judge is in senior status he or she would not owe any County occupational tax.

37. Ordinance 1120 has already been declared lawful and constitutional by a State Circuit Court and by the Alabama Supreme Court. It would be self-defeating and chaotic to conclude that a taxpayer would still have an "honestly held belief" that the Ordinance is unconstitutional as to that taxpayer.

38. Good and sufficient reasons for a waiver of penalty and/or interest may include, but are not limited to, situations where the taxpayer did not pay the tax based upon erroneous information provided by the County Revenue Department. Another good and sufficient reason includes situations where penalty and interest are calculated on an erroneous amount of base tax. In those situations, a taxpayer may be granted a partial waiver of penalty and interest.

39. Section 6-2-35(2), Alabama Code.

40 - 41. There does not appear to be a criminal statute for violation of Ordinance 1120.

/s/ Randy Godeke
RANDY GODEKE, Director,
Jefferson County Department of
Revenue

[Jurat and Certificate of Service Omitted in Printing]

* * * * * * *

REQUEST FOR CERTIFICATION TO
APPEAL INTERLOCUTORY ORDER

Filed August 18, 1993

[Caption Omitted in Printing]

Come now the Defendants, Jefferson County, Alabama and Randy Godeke, and the Intervenor, Birmingham-Jef-

ferson Civic Center Authority, and in accordance with Rule 5, Alabama Rules of Appellate Procedure, hereby request this Court to certify as immediately appealable its Interlocutory Order denying Defendant's MOTION FOR SUMMARY JUDGMENT on all federal constitutional and statutory claims (except the Buck Act claim) contained in Counts I and II of the Complaint. In further support of this request, Defendants state as follows:

1. This request for certification is presented to this Court simultaneously with a MOTION TO VACATE PRIOR ORDER, being the ORDER which this Court rendered on April 8, 1993. Said motion demonstrates that if the action by the Jefferson County Circuit Clerk of merely writing "4-9-93 order per sep paper. Jd Rochester" on the Case Action Summary sheet constitutes an entry of the ORDER, the Clerk violated Rule 77(d), Alabama Rules of Civil Procedure, by failing to immediately notify parties of the rendition and entry of the ORDER. Accordingly, this REQUEST FOR CERTIFICATION TO APPEAL INTERLOCUTORY ORDER assumes that the Court will grant the MOTION TO VACATE PRIOR ORDER and render another Order to which this request for certification applies.

2. In its ORDER in paragraph 1 the Court found that:

> 1. In *Bedingfield v. Jefferson County,* 527 So.2d 1270 (Ala. 1988), neither the trial court nor the Alabama Supreme Court *determined* whether Alabama Act No. 406 (Alabama Legislature 1960) authorized the tax in question, or Jefferson County Ordinance No. 1120 (Jefferson County Commission 1987), imposing the tax in question violates the equal protection clause of the *United States Constitution* by creating an unreasonable, unjust and improper classification of citizens subject to the tax while exempting cer-

> tain citizens from said tax in an arbitrary, irrational and unjust manner.

Whereas, in paragraph 3 the Court found that:

> 3. The trial court in *Bedingfield v. Jefferson County,* 527 So.2d 1270 (Ala. 1988), did in fact *consider* the constitutionality of Act No. 406 and Jefferson County Ordinance No. 1120 as it relates to the *Constitution of Alabama* of 1901 and found "nothing" in said Act to be "repugnant" to such a degree as to invalidate the Act, and further did not find Ordinance No. 1120 to be "invalid". (*Order* of Judge Braxton Kittrell, Specially Sitting, CV-87-504-465 and CV-87-504-469, Jefferson County, Alabama, December 11, 1987)

The Court then declared:

> The state constitutional issues in this matter have been previously adjudicated.
>
> Accordingly, summary judgment is GRANTED in favor of defendants and against plaintiffs as to Counts III and IV of the complaint based on the doctrine of *res judicata.* Summary judgment is DENIED as to Counts I and II.

The Court's ORDER confirms the application of the doctrine of *res judicata* to Plaintiffs' Complaint in this case by declaring that neither Act No. 406 or Ordinance 1120 violated the Constitution of Alabama. However, the Court finds that neither the trial court nor the Alabama Supreme Court "determined" whether Act No. 406 or Ordinance No. 1120 "violates the equal protection clause of the United States Constitution", and denied summary judgment as to Count I (federal employees Buck Act and federal equal protection claims) and Count II (non federal employees federal equal protection claim).

The Alabama Supreme Court has repeatedly held that the doctrine of *res judicata* bars claims which *could have been raised* in the prior suit along with the claims that were actually raised and adjudicated. See *Baker v. City of Guntersville*, 1992 WL 69934 (1992); *NAACP v. Hunt*, 891 Fed.2d 1555 (11th Cir. 1990); *Dairyland Insurance Company v. Jackson*, 566 So.2d 723 (Ala. 1990); *Hughes v. Allenstein*, 514 So.2d 858 (Ala. 1987); *Robinson v. Holley*, 549 So.2d 1 (Ala. 1989); *Garris v. South Alabama Production Credit*, 537 So.2d 911 (Ala. 1989); *Dominick's, Inc. v. Key*, 546 So.2d 1047 (Ala. 1984); *Wheeler v. First Alabama Bank*, 364 So.2d 1190 (Ala. 1978).

3. It is axiomatic that the alleged violations of the equal protection clause of the United States Constitution could have been raised by the *Bedingfield* plaintiffs. Thus, it is immaterial whether the *Bedingfield* trial court or the Supreme Court actually "determined" or "adjudicated" such claim. Because the federal equal protection claim *could have been raised* in *Bedingfield*, that claim is clearly barred by *res judicata*.

4. In accordance with the requirements of Rule 5, the Defendants assert the following:

a. The applicability of *res judicata* to the federal constitutional and statutory claims in Counts I and II (except Buck Act claim) is a controlling question of law as to which there is a substantial ground for difference of opinion.

b. That an immediate appeal from the ORDER would materially advance the ultimate termination of the litigation.

c. That the appeal would avoid protracted and expensive litigation.

Specifically, Defendants contend that the application of *res judicata* to the federal equal protection claims in

Counts I and II of the Complaint, which are claims that could have been raised in *Bedingfield*, is a controlling question of law which will dispose of all federal constitutional claims in this case.

Secondly, such adjudication of the federal constitutional claims would materially advance the ultimate termination of the litigation by leaving only the Count I (Buck Act) claim as to certain federal employees. Such federal employees are limited in number. Moreover, the Buck Act claim is a question of law which may be quickly decided on a follow up motion for summary judgment while the Rule 5 appeal is proceeding.

Finally, such disposition of the federal constitutional claims will avoid protracted and expensive litigation. The Defendant Jefferson County is a public entity. The Intervenor Birmingham-Jefferson County Civic Center is a public entity. The occupational tax revenue goes to the County General Fund. $10,000,000 per year is irrevocably pledged to payment of Birmingham-Jefferson County Civic Center bonds. The balance of about $26,000,000 represents approximately *one-third* of the County General Fund. It pays for hundreds of public projects and public contracts and commitments for public services to thousands of individuals. Accordingly, if the federal constitutional claims in Counts I and II remain in this case, the Defendants must initiate contingency planning that may include suspension and termination of projects and contracts and cancellation of commitments; hiring freezes and development of employee lay-off lists. The affected projects include the renovation of the County Nursing Home (for the impecunious) currently in process, renovations of the Cooper Green Hospital (for indigents) currently in process and the construction of the Juvenile and Family Court of Jefferson County, phase one currently in progress. There are hundreds of individuals and institutions who have purchased securities issued by the County

and by the Birmingham-Jefferson Civic Center which are secured and paid by occupational tax revenue. These individuals and institutions will be greatly concerned for the value and security of the bonds. An immediate appeal with disposition of the federal constitutional claims on *res judicata* should completely diminish the disruption, confusion and concern described above.

Also, as previously noted to the Court, the class members involved in Count II of the Complaint include *every taxpayer* of the Jefferson County occupational tax. There are several hundred thousand of such putative class members. Defendants do not have an individual identification by name and address of most of the class members. Defendants rely on employers to withhold and make payment of the occupational tax through consolidated returns. Discovery and identification of the class members will disrupt the business of the Department of Revenue and the County at a substantial cost of lost productive time and incurrence of overtime for the County and for all of the public employers and the private employers from whom information must be obtained. Defendants contend that the Rule 5 appeal will result in the barring of all such federal constitutional claims which will dispose of the foregoing loss of public and private funds and resources for such class certification and notification.

5. Defendants submit that no party will be prejudiced by an interlocutory appeal. The Plaintiffs will be spared the expenditure for and effort of discovery and class certification. Further, the intervening time period may be used to seek legislation that would moot the underlying complaint in the future.

6. Defendants submit that there can be no more appropriate use of a Rule 5 appeal than exists in this case. The great impact of the federal constitutional claims on the public interests described above is compelling for the

application of a Rule 5 appeal which provides a very realistic opportunity to avoid the great public losses and other grim effects of its continuation.

[Subscription of Attorney and Certificate of Service Omitted in Printing]

* * * * * * *

IN THE CIRCUIT COURT FOR
JEFFERSON COUNTY, ALABAMA

ORDER

Filed November 17, 1993

[Caption Omitted in Printing]

After a consideration of the law, statutes, legal evidence and argument of counsel for the parties the Court finds that Defendant is entitled to summary judgment as to certain claims raised by the Plaintiffs due to the doctrine of res judicata, but that certain of Plaintiffs' claims should not be dismissed. The Court FINDS as follows:

1. In *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), neither the trial court nor the Alabama Supreme Court determined whether Alabama Act. No. 406 (Alabama Legislature 1967), authorizing the tax in question, or Jefferson County Ordinance No. 1120 (Jefferson County Commission 1987), imposing the tax in question, violates the equal protection clause of the United States Constitution by creating an unreasonable, unjust and improper classification of citizens subject to the tax, while exempting certain citizens from said tax in an arbitrary, irrational and unjust manner.

2. In *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), neither the trial court nor the Alabama Supreme Court determined whether the tax in question violates

the Buck Act (4 U.S.C. § 111) as it pertains to federal employees.

3. The trial court in *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), did in fact consider the constitutionality of Alabama Act No. 406 and Jefferson County Ordinance No. 1120 as it relates to the *Constitution of Alabama* of 1901 and found "nothing" in said Act to be "repugnant" to such a degree as to invalidate the Act, and further did not find Ordinance No. 1120 to be "invalid." (*Order* of Judge Braxton Kittrell, Specially Sitting, CV-87-504-465 and CV-87-504-469, Jefferson County, Alabama, December 11, 1987.) Thus the state constitutional issues in this matter have been previously adjudicated.

Accordingly, Summary Judgment is GRANTED in favor of Defendant, and against Plaintiffs as to Counts Three and Four of the Complaint based on the doctrine of res judicata. Summary judgment is DENIED as to Counts One and Two.

Done and Ordered this 17th day of November, 1993.

JOHN E. ROCHESTER, Circuit Judge
Specially Sitting

* * * * * * *

IN THE CIRCUIT COURT FOR
JEFFERSON COUNTY, ALABAMA

ORDER

Filed November 17, 1993
[Caption Omitted in Printing]

This case came on for hearing on Defendants' and Intervenor's REQUEST FOR CERTIFICATION TO APPEAL INTERLOCUTORY ORDER. Defendants Jefferson County and the Birmingham-Jefferson Civic Center Au-

thority urge the Court to certify as appealable under Rule 5, Alabama Rules of Appellate Procedure, that portion of its ORDER of November 17, 1993, denying summary judgment for Defendants on Count 1 and Count 2 of Plaintiff's Complaint. Defendants' summary judgment motion maintained that all four counts of the Complaint, except that portion of Count 1 asserting federal employees' Buck Act (4 U.S.C. § 111) claims, are barred by *res judicata* based upon the decision of the Supreme Court in *Bedingfield v. Jefferson County*, 527 So.2d 1270 (1988). The ORDER granted summary judgment as to Counts 3 and 4 based on the doctrine of *res judicata*. The remaining Count 1 asserts federal employees' Buck Act claims and federal constitutional claims. The remaining Count 2 asserts non-federal employees' federal constitutional claims.

In support of the REQUEST FOR CERTIFICATION to appeal under Rule 5, the parties have informed the Court and the Court hereby finds the following with respect to the Rule 5 requirements.

The Jefferson County occupational tax at issue in this case generates approximately $36,000,000 per year. Ten million dollars of the annual proceeds are pledged for a twenty year period to pay the main component of debt service on bonds of the Birmingham-Jefferson Civic Center authority (the "Civic Center Authority") that are now outstanding in the principal amount of $123,205,000 (the City of Birmingham has pledged $3,000,000 per year to pay the remaining debt service on these bonds).

With respect to class certification there are several hundred thousand putative class members who pay the County occupational tax. However, Defendants rely on employers to withhold and pay the tax and, therefore, Defendants do not have an individual identification by name and address of most of the putative class members.

WHEREFORE, upon due consideration of the foregoing; the purpose and requirements of Rule 5, Alabama Rules of Appellate Procedure; and, the arguments of counsel, it is the OPINION of the Court and the Court thereby finds that the portion of its ORDER denying summary judgment on Counts 1 and 2, except for the federal employees' Buck Act claim, should, as a matter of public interest and exigency, be and hereby is CERTIFIED as immediately appealable in accordance with Rule 5, Alabama Rules of Appellate Procedure. The Court further finds and CERTIFIES as follows:

1. Whether Plaintiffs' claims asserted in Counts 1 and 2 are also barred by the doctrine of *res judicata* is a controlling question of law as to which there is substantial ground for difference of opinion.

2. The Plaintiffs' claims asserted in Counts 1 and 2 also present a controlling question of law, as to which there is substantial ground for difference of opinion, with respect to the issue of whether Act No. 406 enacted by the Legislature of Alabama in 1967 (the statute authorizing the levy of the County's occupation tax), by its terms, denied the Plaintiffs and other citizens similarly situated the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution. Act No. 406 and the general professional licensing laws of the State of Alabama exempt certain professions and occupations from the County's occupation tax and in so doing make certain legislative classifications among the citizens of the County for purposes of levying the tax in question.

3. An immediate appeal from the Interlocutory ORDER would materially advance the ultimate termination of the litigation. While the questions herein certified are on appeal, this Court expects to proceed to adjudicate the sole remaining Buck Act claim on behalf of a relatively small class of federal employees who work in the

County. The parties have advised the Court that they are not aware of any factual disputes pertaining to the Buck Act claim, therefore, said claim may be decided on cross motions for summary judgment, thereby terminating the litigation in the circuit court.

4. An interlocutory appeal would avoid protracted and expensive litigation. If it is determined by the Rule 5 appeal that Counts 1 and 2 are barred either by *res judicata* or by decision of the equal protection question as a matter of law, both the Defendants and the Plaintiffs' employers in the County would be spared the great cost and disruption of having to identify and locate and give notice to each of the several hundred thousand class members.

DONE and ORDERED this 17th day of November, 1993.

/s/ John E. Rochester
JOHN E. ROCHESTER, Circuit Judge
Specially Sitting

* * * * * * * *

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1994-95

1930255

Jefferson County and the Birmingham-Jefferson Civic Center Authority

v.

Jason Richards, et al.

Appeal from Jefferson Circuit Court
(CV-92-3191)

ALMON, JUSTICE.

This appeal by permission is from the denial of a summary judgment in a declaratory judgment action brought on behalf of two classes of taxpayers against Jefferson County. The taxpayers sought to have Act 406, 1967 Ala. Acts, and Jefferson County Ordinance 1120, adopted in 1987, declared unconstitutional. Act 406 authorizes the Jefferson County Commission to levy a county occupational tax on all persons who earn wages in the County and who are not required to pay the state business license tax. Ordinance 1120 levies the county occupational tax at the rate of .005 ($\frac{1}{2}$ of 1%) on all eligible income earned in the county, exempting persons who pay the state business license tax and domestic servants employed in private homes. The complaint was filed by two classes of taxpayers: the "Foley-Dykes" class, which represents all Federal employees subject to the tax, and the "Richards-Hill" class, which represents all non-Federal employees subject to the tax. The complaint alleges that Act 406 and Ordinance 1120 violate the equal protection and due process provisions of the Federal and State constitutions, and, with regard to the class of Federal employees only, the Buck Act, 4 U.S.C. § 111 et seq. The plaintiffs allege

that the Act and the ordinance are made unconstitutional by what they call the arbitrary and irrational character of the exemptions. The Birmingham-Jefferson Civic Center Authority ("BJCC") was allowed to intervene, asserting as its interest $10 million per year of occupational tax proceeds that have been pledged to the BJCC for a 20-year period to repay BJCC special tax bonds that are now outstanding in the principal amount of over $123 million.

The County moved for a summary judgment, contending that all of the claims, except for the Federal employees' Buck Act claim, are barred by the doctrine of *res judicata*, based on the action that was the subject of this Court's opinion in *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988). The trial court entered a summary judgment for the County on all State constitutional claims, but denied the motion for summary judgment with regard to the Federal constitutional and statutory claims, stating:

> "In *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988), neither the trial court nor the Alabama Supreme Court determined whether Alabama Act No. 406 (Alabama Legislature 1967), authorizing the tax in question, or Jefferson County Ordinance No. 1120 (Jefferson County Commission 1987), imposing the tax in question, violates the equal protection clause of the United States Constitution by creating an unreasonable, unjust and improper classification of citizens subject to the tax, while exempting certain citizens from said tax in an arbitrary, irrational and unjust manner."

Pursuant to Rule 5, Ala. R. App. P., we granted the County permission to appeal the denial of the summary judgment. The issue before us is whether the trial court correctly held that the Federal constitutional claims are

not barred by the doctrine of *res judicata* and thus correctly denied the summary judgment on these claims.

The doctrine of *res judicata* is a well-established principle of law:

> "The elements of res judicata, or claim preclusion, are (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both suits. *Hughes v. Allenstein*, 514 So. 2d 858, 860 (Ala. 1987)."

Dairyland Insurance Co. v. Jackson, 566 So. 2d 723, 725 (Ala. 1990).

> "If those four elements are present, any claim that was or could have been adjudicated in the prior action is barred from further litigation."

Id.; *Crutcher v. Wynn*, 591 So. 2d 453, 454 (Ala. 1991); *Ex parte McCracken*, 576 So. 2d 664, 665 (Ala. 1991); *Wood v. Tricon Metals & Services, Inc.*, 548 So. 2d 138, 140 (Ala. 1989); *Trimble v. Bramco Products, Inc.*, 351 So. 2d 1357 (Ala. 1977).

> "In general a judgment is res judicata not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit."

Heiser v. Woodruff, 327 U.S. 726, 735 (1946) (citations omitted).

The appeal in *Bedingfield* arose from two complaints that were consolidated in a single action. One complaint was filed by Hoyt Bedingfield, Jr., individually as a taxpayer, and also in his capacity as acting director of finance of the City of Birmingham, and by the City of Birmingham. The Bedingfield/Birmingham complaint requested a judgment declaring

> "that Ordinance No. 1120 adopted by the Jefferson County Commission is void and invalid, and if necessary, that Act No. 406 passed by the Alabama Legislature in 1967 and approved by the Governor on September 7, 1967, is void and invalid to the extent that it supports any comprehensive occupational tax on all persons working in Jefferson County."

Among the grounds alleged in that complaint were that "Act 406 is a violation of the equal protection requirements and provisions of the federal and state constitution," and that "Act 406 is vague and ambiguous and therefore is a violation of the due process requirements of the state and federal constitution."

The second complaint sought declaratory and injunctive relief "against the action of the Jefferson County Commission levying an occupational tax on employees of Jefferson County." It was filed by three persons "in their individual capacity" as "employees within Jefferson County." In addition to several other allegations of violations of due process and equal protection principles, the complaint alleged that the tax

> "constitutes a denial of equal protection in violation of the Fourteenth Amendment of the United States Constitution. *Said Act exempts professional occupations required by State law to be licensed but does not exempt other professional and nonprofessional occupations.*"

(Emphasis added.) This allegation is the substance of the allegations made in the complaint now before the Court.

The complaint that is the subject of this appeal asks the circuit court to "declare the occupational tax unconstitutional, as depriving plaintiffs of due process of law and equal protection of the laws" guaranteed under the United States and Alabama Constitutions. The same cause of action was presented in both actions. Both were

actions for declaratory judgments challenging the constitutionality of the Jefferson County occupational tax. Both complaints alleged violations of the equal protection and due process provisions of the State and Federal constitutions. The appellate briefs in *Bedingfield* argued an equal protection issue regarding the fact that Act No. 406 applied only to counties with a population of 500,000 or more. *Bedingfield* was decided, both by the circuit court and by this Court, on other State constitutional grounds, but the Federal and State equal protection and due process claims were pleaded, and it is at least true that they "could have been adjudicated." *Dairyland Ins. Co. v. Jackson*, 566 So. 2d 723, 725 (Ala. 1990). Furthermore, they arguably *were* adjudicated, because they were grounds stated as a basis for relief, and a final judgment denying relief was affirmed.

"*Res judicata* applies not only to the precise legal theory presented in the prior case, but to all legal theories and claims arising out of the same nucleus of operative fact." *NAACP v. Hunt*, 891 F. 2d 1555, 1561 (11th Cir. 1990) (citations omitted).

> "'[A] party . . . is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds on which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible.' *Baltimore Steamship Company v. Vernon Philips*, 274 U.S. 316 [47 S.Ct. 600, 71 L.Ed.2d 1069] (1926)."

Century 21 Preferred Properties, Inc. v. Alabama Real Estate Comm'n, 401 So. 2d 764, 768 (Ala. 1981) (per Jones, J., with three Justices concurring and two Justices concurring in the result).

The only other element of *res judicata* that is at issue is "substantial identity of the parties," *see Dairyland, supra.*

> "The second set of persons to whom *res judicata* applies is composed of those persons who are or were in privity with the parties to the original suit. . . . Privity is defined as 'a relationship between one who is a party of record and a nonparty that is sufficiently close so a judgment for or against the party should bind or protect the nonparty.' . . . Privity exists where the nonparty's interests were represented adequately by the party in the original suit. . . . Privity also exists where a party to the original suit is 'so closely aligned to a nonparty's interest as to be his virtual representative.' *United Merchants & Mfrs., Inc. v. Sanders*, 508 So. 2d 689, 692 (Ala. 1987)."

NAACP v. Hunt, supra, at 1560-61 (citations omitted). *See also Century 21, supra.* The taxpayers in the *Bedingfield* action adequately represented the interests of the taxpayers here, and the respective taxpayers' interests are not only closely aligned — they are essentially identical. The "substantial identity of the parties" element of *res judicata* is met here.

The wisdom of disallowing successive attacks on the county tax on grounds that could have been pursued and adjudicated in the initial challenge is demonstrated by the BJCC's motion to intervene, which recites that it issued two series of bonds in 1989 to expand and improve the civic center. The motion continues:

> "[P]ursuant to that certain Pledge and Appropriation Agreement between the Defendant Jefferson County and the intervenor, said Defendant appropriated, pledged and agreed to pay a portion of the proceeds of the Occupational Tax [at] issue in this matter to the BJCC for repayment of the Series 1989 and Series 1989B Capital Outlay Special Tax Bonds issued by the BJCC in twenty (20) annual payments of

> $10,000,000.00 beginning in the year 1989 and ending in the year 2008."

In 1989, the county and the Authority, in pledging the occupational tax revenue and issuing the bonds, could have relied on *Bedingfield* as authoritatively establishing that the county occupational tax was not unconstitutional for the reasons asserted by the *Bedingfield* plaintiffs. To allow a challenge now that was pleaded and could have been adjudicated in *Bedingfield* would not only violate the *res judicata* principles discussed above, but would also improperly interfere with the operations of the county and the BJCC and undermine the security of the bonds, to the detriment of the bondholders.

For the foregoing reasons, we conclude that the circuit court incorrectly held that *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988), did not, by the operation of the doctrine of *res judicata*, bar this action.

REVERSED AND REMANDED.

Shores, Kennedy, Cook, and Butts,* JJ., concur.

Maddox, J., dissents.

---

*Although Justice Butts was not a member of this Court when this case was orally argued, he has listened to the tape of oral argument and has studied the record.

Jefferson County and the Birmingham-Jefferson Civic Center Authority v. Jason Richards, et al.

MADDOX, JUSTICE (dissenting).

The elements of the doctrine of res judicata have been precisely set out by this Court in *Wheeler v. First Alabama Bank of Birmingham*, 364 So. 2d 1190, 1199 (Ala. 1978), where this Court said:

> "The elements of res judicata are as follows: (1) prior judgment rendered by court of competent jurisdiction; (2) prior judgment rendered on the merits; (3) parties to both suits substantially identical; and (4) same cause of action present in both suits."

See also Dominey v. Mathison, 292 Ala. 293, 293 So. 2d 471 (1974), and my dissenting opinion in *Century 21 Preferred Properties, Inc. v. Alabama Real Estate Comm'n*, 401 So.2d 764, 770 (Ala. 1981). Even a cursory examination of this doctrine as applied to the facts of this case reveals that it has no application to this case. In this dissent, I will make a brief statement of the facts and will state the principle of law I think should be applied to sustain the trial court's order.

The majority holds that these plaintiffs are bound by the judgment rendered in *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988), where the City of Birmingham challenged the constitutionality of Act No. 406 and the validity of a county ordinance establishing an occupational tax.

The trial judge, in denying the defendant's motion for a summary judgment in this case (that motion being based on the ground that the action was barred by the doctrine of *res judicata)*, issued an order in which he concluded, in part, that "[i]n *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988), neither the trial court nor

[this Court] determined whether Act No. 406 (Alabama Legislature 1967), authorizing the tax in question, or Jefferson County Ordinance No. 1120 (Jefferson County Commission 1987), imposing the tax in question, violates the equal protection clause of the United States Constitution by creating an unreasonable, unjust and improper classification of citizens subject to the tax, while exempting certain citizens from said tax in an arbitrary, irrational and unjust manner." The trial judge also determined that "[i]n *Bedingfield v. Jefferson County*, 527 So. 2d 1270 (Ala. 1988), neither the trial court nor [this Court] determined whether the tax in question violates the Buck Act (4 U.S.C. § 111) as it pertains to federal employees." I agree with the trial court on both points.

In concluding that the trial judge was correct, I have examined the pleadings in *Bedingfield* and the order entered by the trial judge in that case and I have studied the opinion issued by this Court in *Bedingfield*, a case in which I participated. I have also carefully considered the argument of Jefferson County that "the claims in this case arise from the same nucleus of operative fact as the claims made in *Bedingfield* and [that] because the evidence necessary to support both claims is *identical*, it is axiomatic that the fourth element of *res judicata* is satisfied," and I have given careful consideration to the views of my colleagues expressed in the majority opinion, and my only comment is that if the "same cause of action presented in both suits" element of the res judicata doctrine is so easily satisfied, then it could be extended *ad infinitum* and would establish a precedent that could close the courthouse doors to other plaintiffs in other cases who might find themselves faced with the rule of law herein established. I think that the Court is establishing a bad precedent.

My opinion that *Bedingfield* does not bar the claims presented in this case is the same as that of the trial

judge: that this Court, in *Bedingfield*, did not adjudicate these claims, or any claim similar to them. The West Publishing Company synopsis in *Bedingfield* succinctly states what that case was about, and the issues it adjudicated:

> "City challenged constitutionality of county ordinance establishing occupational tax. The Circuit Court, Jefferson County, Braxton L. Kittrell, Jr., J., upheld ordinance, and appeal was taken. The Supreme Court, Beatty, J., held that: (1) statute authorized county to levy occupational tax; (2) statute was general rather than local legislation; and (3) statute authorizing levy of tax provided for collection of such tax."

527 So. 2d at 1270. Where in the *Bedingfield* opinion is there an adjudication of the federal constitutional claims the plaintiffs raise in the instant action? Neither the order of the trial judge nor the opinion of this Court contains a single reference to whether the Act and the county ordinance violate any provision of the Federal Constitution.

It is true that the plaintiffs, in *Bedingfield*, did allege in their complaint that "[i]f Ordinance No. 1120 were authorized by Act 406, then Act 406 is unconstitutional based upon any one of the following grounds: . . . . B. Act 406 is a violation of the equal protection requirements and provisions of the federal and state constitutions." But I ask this question: Is the mere making of such an allegation in a complaint sufficient to satisfy the "same cause of action presented in both suits" element of the res judicata doctrine? I think not, especially when the adjudicatory orders of the trial court, and of this Court, affirmatively show that the issues in *Bedingfield* involved whether Act No. 406 was a general law or was a local law because the Act was applicable only to counties with a population of 500,000 or more.

But even assuming that the federal equal protection claim was presented and adjudicated in *Bedingfield*, the plaintiffs in this case are attacking the *exemption scheme* contained in Ordinance No. 1120, which exempts a number of occupations from the occupational tax.[1] Clearly,

---

[1] Ordinance 1120 taxes the gross receipts of any person who engages in or follows any "vocation, occupation, calling and profession," but exempts from its definition of "vocation, occupation, calling and profession" the following: utility companies; freight lines and equipment companies; electric companies; gas companies; railroads; telephone companies; telegraph companies; express companies; financial institutions; insurance companies; abstract companies; acetylene gas and carbide manufacturers; adding machine, calculating machine, and comptometer businesses; advertising companies; air conditioning plant and equipment businesses; amusement parks; architects; attorneys; auctioneers; automobile dealers; automobile accessory dealers; automobile garages and shops; automobile storage garages; tire retreading shops; barbers; baseball parks; battery shops; beauty parlors; bicycle and motorcycle dealers; blueprint makers; bond makers; bottlers; bowling alleys; iron, railway supply, furnace supply, and mining supply brokers and agents; broom, brush, and mop manufacturers; cereal and soft drink retailers and wholesalers; certified public accountants; cigar, cigarette, and cheroot retailers and wholesalers; circus operators; cleaning and pressing establishments; coal and coke dealers; coffin and casket manufacturers, dealers, and agents; collection agencies; commission merchants or merchandise brokers; concert and musical entertainers; persons engaged in discounting notes, mortgages, and conditional sales contracts; construction companies or contractors; cotton buyers; cotton compress operators; millers; persons operating cotton warehouses; credit agency personnel; persons operating creosoting businesses; delicatessen shops; dentists; detectives; film developers and printers; directory printers; refrigerator dealers; embalmers; engineers; domestic servants employed in private homes; owners and operators of fertilizer factories; damaged and close out goods salesmen; fireworks dealers; fortunetellers; palmists; clairvoyants, astrologers; phrenologists and crystal gazers; fruit dealers; gasoline station and pump operators; glass salesmen; golf course operators; hat cleaners; fur dealers; horse, rodeo, and dog and pony show operators; horse and mule dealers; ice cream manufacturers; innkeepers; junk dealers; launderers; sleight-of-hand artists; lighting rod installers; lumber dealers and jobbers; lumberyard operators; machinery repair shops; manicurists; hairdressers; upholsterers; doctors, chemists, bacteriologists, and roentgenologists; persons engaged in the photocopy business; miners; monument and tombstone sellers; motion picture operators; oculists, optometrists, and opticians; osteopaths and chiropractors; operators of packing houses and cold storage plants; pawnbrokers; peddlers and itinerant vendors; photographers; musical instrument salesmen; pig iron storage operators; pistol and knife dealers; playing card salesmen; plumbers, steamfitters and tin shop operators; operators of pool halls, owners of racetracks and athletic fields; radio salesmen; real estate brokers and agents; restaurant, cafe, and cafeteria operators; operators of roadhouses, nighclubs, and public dance halls; sandwich shops, barbecue stands, hamburger and hot dog stands; sawmills; scientists, naturopaths and chiropodists; sewing machine salesmen; shooting gallery operators; shotgun and rifle dealers; skating rink operators; soliciting brokers; stock and bond brokers; street fair and carnival operators; syrup and sugar factory operators; theater, vaudeville, and variety show operators; ticket scalpers; tourist camp operators; tractor, road machinery, and trailer dealers; trading stamp merchants; freight carriers; transient dealers, vendors, and peddlers; turpentine stillers; vending machine operators; veterinarians; warehouse operators; wax factory operators and waste grease and animal by-product purchasers and receivers. See Ordinance 1120, § 1(B) and § 2; §§ 40-12-40 through 40-12-180, § 40-12-50, §§ 40-12-52 through 40-12-55, §§ 40-12-57 through 40-12-60, § 40-16-6, and § 27-4-9, Ala. Code 1975.

that claim was not presented or adjudicated in *Bedingfield*.

Jefferson County and BJCC argue that even if the plaintiffs' claims were not previously raised or adjudicated in the *Bedingfield* case, the claims are barred, nevertheless, because "any claim that was or could have been adjudicated in the prior action is barred from further litigation." *Dairyland Insurance Co. v. Jackson*, 566 So. 2d 723, 725 (Ala. 1990). Stated differently, the County and BJCC contend that the theory on which the plaintiffs bring this action could have been asserted in the

Bedingfield case and that this action is therefore due to be dismissed.

The test for determining whether two cases involve substantially the same cause of action is whether the same evidence would support a recovery in both actions. *Barber v. Fields*, 624 So. 2d 532, 536 (Ala. 1993); *Vaughan v. Barr*, 600 So. 2d 994, 996 (Ala. 1992); *Waters v. Jolly*, 582 So. 2d 1048, 1053 (Ala. 1991); *Garris v. South Alabama Production Credit Ass'n*, 537 So. 2d 911, 914 (Ala. 1989); *Dominex, Inc. v. Key*, 456 So. 2d 1047, 1054-55 (Ala. 1984); *Wheeler v. First Alabama Bank of Birmingham*, 364 So. 2d 1190, 1200 (Ala. 1978). In *Barber v. Fields*, this Court reversed a summary judgment entered on *res judicata* grounds where both the former and the latter cases involved the city water service but the claims in the latter case, which pertained to the removal of water meters, was not litigated in the former case, which involved a claim that the city's refusal to extend water service to the plaintiff's land was a violation of her right to equal protection of the laws. *Barber*, 624 So. 2d at 536. In *Vaughan v. Barr*, this Court reversed a judgment entered on *res judicata* grounds where both the former case and the latter case involved the same land and landowners but the former case, which involved a boundary dispute, was "based on different theories" and "require[d] different evidence" from that required in the latter case, which involved a claim of an easement by necessity. *Vaughan*, 600 So. 2d at 996.

Although this case and the *Bedingfield* case involve Act 406 and Ordinance 1120, the similarity there ends, because the evidence necessary to prove the claims asserted in this case, and the legal arguments in support of those claims, will be very different from those in *Bedingfield*. Here, the plaintiffs allege that the exemptions to the tax violate their equal protection rights under the Federal Constitution. The Federal employees are permitted to

maintain their Buck Act claims. How are their claims different from those of the non-Federal employees who claim equal protection violations? In each case, the plaintiffs apparently are citizens of the United States who are claiming protection of their rights under Federal constitutional and statutory provisions. The foundation of their claims, the Federal Constitution, is the same.

I have carefully examined the arguments of Jefferson County and those of BJCC, and I recognize the importance of this case to those entities, but I think the law is against them. The plaintiffs' claims in this case are just different from those presented in *Bedingfield*, and the evidence necessary to prove their claims will be very different from the evidence used to prove the claims asserted in *Bedingfield*. In fact, the issues presented in *Bedingfield* were largely legal issues relating to the classification between counties of 500,000 or more in population and counties of less than 500,000 in population and to the question of whether Act 406 violated the Alabama Constitution, and there is no mention in *Bedingfield* of any Federal constitutional claims adjudicated in either the trial court or this Court.

Based on the foregoing, I believe that the fourth element of the doctrine of *res judicata* as set forth in *Dairyland Insurance Co. v. Jackson*, 566 So. 2d 723, 725 (Ala. 1990) ("the same cause of action presented in both suits"), is not present in this case; I believe that the trial judge correct concluded that the plaintiffs could maintain their action.

* * * * * * *

APPLICATION FOR REHEARING

Filed April 14, 1995
[Caption Omitted in Printing]

Come now Jason Richards and Fannie Hill, Appellees, and respectfully move the Court to grant them rehearing in the above captioned cause, with affirmance rather than reversal of the Circuit Court's ruling upon partial summary judgment, upon the following grounds:

1. The Court's opinion recognizes Appellants' claim as one to "declare the occupational tax unconstitutional, as depriving plaintiffs of due process of law and equal protection of the laws" guaranteed under the Untied States and Alabama Constitutions, but fails to acknowledge that Hoyt Bedingfield and his co-plaintiffs were incapable of binding them to the outcome of his prior litigation his was not a class action (which would have allowed plaintiffs to "opt out" or intervene to protect their interests here in issue).

2. Appellant Fannie Hill's standing to represent domestic servants employed in commercial buildings who are subject to the tax, while domestic servants employed in private homes are exempted, has been rejected without comment by this Court, in spite of the fact that neither Bedingfield nor any of his co-plaintiffs had standing to present such a claim.

[Subscription of Attorney and Certificate of Service Omitted in Printing]

* * * * * * * *

IN THE SUPREME COURT OF ALABAMA

June 9, 1995

1930255

Jefferson County and the Birmingham-Jefferson Civic Center Authority v. Jason Richards, et al. (Jefferson: CV-92-3191)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

ALMON, J. — Shores, Kennedy, Cook and Butts, JJ, concur; Maddox, J., dissents.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 9th day of June, 1995.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama